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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PHILADELPHIA REINSURANCE CORPORATION; ASSICURAZIONI GENERALI; EXCESS AND CASUALTY REINSURANCE ASSOCIATION; AND THE REINSURANCE CORPORATION OF NEW YORK,

Petitioners,

v.

THE NORTH RIVER INSURANCE COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an order directing arbitration to proceed under Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, must be immediately appealed under Section 16(a)(3) of the FAA, 9 U.S.C. § 16(a)(3), if entered in a so-called "independent action"—an action brought solely to compel arbitration.

2. Whether the law of the case doctrine or Section 10 of the FAA, 9 U.S.C. § 10, precludes a district court from vacating an arbitration award before a final judgment is entered where the legal basis for the court's earlier ruling compelling arbitration on terms and conditions inconsistent with the terms of the agreement to arbitrate was overturned by the court of appeals during the pendency of the arbitration.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The Appellees in the Second Circuit are Philadelphia Reinsurance Corporation; Assicurazioni Generali; Excess and Casualty Reinsurance Association; and Underwriters and Underwriting Syndicates at Lloyd's and Foreign Companies Subscribing to Second Excess of Loss Reinsurance Contract No. R64939. The Intervenor-Appellee in the Second Circuit is The Reinsurance Corporation of New York. The Appellant in the Second Circuit is The North River Insurance Company.

The Petitioners here are Philadelphia Reinsurance Corporation; Assicurazioni Generali; Excess and Casualty Reinsurance Association; and The Reinsurance Corporation of New York. Underwriters and Underwriting Syndicates at Lloyd's and Foreign Companies Subscribing to Second Excess of Loss Reinsurance Contract No. R64939 have filed a separate Petition for Writ of Certiorari.

Petitioners' corporate parents and nonwholly owned subsidiaries are as follows:

> The ultimate parent of Philadelphia Reinsurance Corporation is Nationale-Nederlanden International B.V., a Netherlands Corporation.
>
> Assicurazioni Generali is an Italian corporation.
>
> Excess and Casualty Reinsurance Association ("ECRA") is a reinsurance pool comprised of a number of insurance and reinsurance companies. Those members whose parent companies, subsidiaries or affiliates have issued shares to the public are as follows:
>
> > The parent of Aetna Casualty and Surety Company is Aetna Life and Casualty Company, which has issued shares to the public.
> >
> > The parent of American Home Assurance Company and National Union Fire Insurance

Company of Pittsburgh, and the ultimate parent of New Hampshire Insurance Company, is American International Group, Inc., which has issued shares to the public.

The parent of Argonaut Insurance Company is Argonaut Group, Inc., which has issued shares to the public.

Continental Casualty Company is a wholly owned subsidiary of CNA Financial Corporation, which has issued shares to the public; Loews Corporation, which has also issued shares to the public, owns a majority of the shares of CNA Financial Corporation.

The parent of Continental Insurance Company is The Continental Corporation, which has issued shares to the public.

The ultimate parent of Associates Insurance Company is Ford Motor Company, which has issued shares to the public.

The parent of The Hanover Insurance Company is Allmerica Property and Casualty Companies, Inc., which has issued shares to the public.

The parent of Home Insurance Company is Home Holdings, Inc., which has issued shares to the public.

The ultimate parent of Insurance Company of North America and CIGNA Property & Casualty Insurance Company is CIGNA Corporation, which has issued shares to the public.

The ultimate parent of General Star National Insurance Company is General Re Corporation, which has issued shares to the public.

The parent of Northeastern Insurance Company of Hartford is USLICO Corporation, which has issued shares to the public.

The parent of Northwestern National Insurance Company is Armco, Inc., which has issued shares to the public.

The ultimate parent of Reliance Insurance Company is Reliance Group Holdings, Inc., which has issued shares to the public.

The parent of Security Insurance Company of Hartford is Orion Capital Corporation, which has issued shares to the public.

The parent of U.S. Fidelity & Guaranty Company is USF&G Corporation, which has issued shares to the public.

The ultimate parent of U.S. Fire Insurance Company is Xerox Corporation, which has issued shares to the public.

Those members of ECRA that are foreign corporations or whose parent companies, subsidiaries or affiliates are foreign corporations are as follows:

The ultimate parent of Employers Commercial Union Insurance Company is Commercial Union, plc, a British corporation.

The parent of General Accident Fire and Life, plc is General Accident, plc, a Scottish corporation.

The parent of Ranger Insurance Company is Fairfax Financial Holdings, Ltd., a Canadian corporation which has issued shares to the public.

Royal Insurance Company, Ltd., is a British corporation.

The ultimate parent of The Reinsurance Corporation of New York is Chartwell Re Corp., which has issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Philadelphia Reinsurance Corporation; Assicurazioni Generali; Excess and Casualty Reinsurance Association; and The Reinsurance Corporation of New York (collectively, the "U.S. Reinsurers") petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit which reversed the order of the United States District Court for

the Southern District of New York vacating an arbitration award.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. A, pp. 1a-12a) is reported at 63 F.3d 160. The opinion of the District Court for the Southern District of New York vacating the arbitration award (App. B, pp. 13a-24a) is reported at 856 F. Supp. 350.

JURISDICTION

The decision of the Court of Appeals was rendered on August 24, 1995. A timely petition for rehearing and suggestion for rehearing *in banc* was denied on October 18, 1995 (App. E, pp. 31a-32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are certain provisions of the Federal Arbitration Act ("FAA"), codified at 9 U.S.C. §§ 1-16. The FAA is reproduced in Appendix G, pp. 35a-43a.

STATEMENT OF THE CASE

This case concerns (1) the appropriate construction of Section 16 of the FAA, which governs appeals from orders relating to arbitration; and (2) a district court's power to alter its earlier decisions relating to arbitration, either under Section 10 of the FAA or as an exception to the law of the case doctrine, when no final judgment has issued and there has been a significant change in the law of the circuit.

Petitioners (also called the "U.S. Reinsurers" because they accepted their share of the reinsurance at issue through offices located in the United States) are reinsurers—entities that assume all or part of specified risks accepted in the first instance by direct insurers. In this case, Petitioners and other domestic and London Market reinsurers (also called the "London Reinsurers" because

they accepted their share of the reinsurance at issue through offices located in London) reinsured Respondent The North River Insurance Company ("North River") under six separate reinsurance treaties that together covered three separate years and two separate dollar layers of risk.

A reinsurance treaty involves an ongoing contractual relationship between the primary insurer and the reinsurer in which the reinsurer agrees to indemnify the insurer for a portion of the insurer's liability in a designated line of business. Each reinsurer accepts a percentage of the total liability under a single treaty. In this case, as is typical, the reinsurers' acceptance of liability was on a several rather than joint basis (App. B, p. 20a) with the resulting arrangement constituting a number of separate contracts between North River on the one hand and, on the other, each reinsurer for its individually designated percentage of the total treaty liability (App. B, p. 20a). Among the six treaties at issue between North River and the U.S. and London Reinsurers, there was no single treaty on which all of these reinsurers participated. The London Reinsurers were parties only to the so-called "second layer treaties" which provided $4 million of coverage in excess of $1 million per occurrence. Moreover, the London Reinsurers' treaties contained an aggregate endorsement, not present in the U.S. Reinsurers' treaties, that directly bore on the issue addressed in the arbitration between North River and the U.S. and London Reinsurers—how North River could combine claims under its original policies and submit them to reinsurers.

North River submitted claims for reimbursement of amounts paid under an original policy issued to the GAF Corporation ("GAF") to both Petitioners and the London Reinsurers. Each rejected those claims on the ground that the treaties did not permit North River to combine all of its payments to GAF for purposes of exceeding the retention or deductible applicable to recovery under the treaties. The aggregate endorsement which applied only

to the London Reinsurers further complicated the disputes (App. A, p. 3a).

The Arbitration Proceedings

Respondent initiated arbitration proceedings against Petitioners in December 1988 and in October 1989 served a notice of intention to arbitrate on the London Reinsurers (App. A, p. 3a). While each treaty contained an arbitration clause, nothing in those arbitration clauses provided for consolidation of separate arbitrations instituted against different reinsurers under the treaties. These Petitioners had no objection to arbitration and voluntarily agreed to a joint hearing of the dispute involving only the U.S. Reinsurer group. However, both the London Reinsurers and Petitioners refused North River's demands for consolidation of the two separate proceedings (App. A, p. 4a). In 1991, North River sued under Sections 4 and 5 of the FAA, 9 U.S.C. §§ 4-5, seeking consolidation as well as appointment of an independent arbitrator or umpire to preside over the consolidated arbitration sought by North River.

Despite the U.S. and London Reinsurers' opposition to consolidated arbitration proceedings, the District Court ordered consolidation of these separate arbitrations (App. D, pp. 27a-30a). The District Court held, based on *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) ("*Nereus*"), that regardless of the contract between the parties, it could order consolidation of otherwise separate arbitrations, based on the liberal purposes of the FAA and the Federal Rules of Civil Procedure (App. D, p. 28a). The District Court retained jurisdiction. Six weeks after entering the consolidation order, the District Court entered another order appointing an umpire (App. C, pp. 25a-26a). The District Court never entered a final judgment, instead placing the matter on the suspense docket and "retain[ing] jurisdiction in the event of any post-award proceedings" (App.

C, p. 26a). Neither Petitioners nor the London Reinsurers appealed the consolidation order as a final decision or sought leave from the District Court to file an interlocutory appeal.

The Post-Award Proceedings

The arbitration was held in July 1993, and in October 1993, the arbitration panel issued a 2-1 award in North River's favor (App. A, p. 4a). A few days before the hearing began, unbeknownst to Petitioners, the Court of Appeals for the Second Circuit overruled *Nereus*, the decision relied on by the District Court to order consolidation of the separate arbitrations, on the ground that "recent Supreme Court case law has undermined our previous conclusion that the FAA's 'liberal purposes' and the Federal Rules of Civil Procedure allow us to consolidate arbitration proceedings absent consent." *Government of United Kingdom v. Boeing Co.*, 998 F.2d 68, 71 (2d Cir. 1993) ("*Boeing*"). North River moved before the District Court which had retained jurisdiction to confirm the arbitration award in its favor, and the Petitioners and the London Reinsurers cross-moved to vacate the award on several grounds, including the *Boeing* decision which held that consolidation of separate arbitrations was improper absent consent of the parties (App. A, pp. 4a-5a).

The District Court vacated the arbitration award (App. B, pp. 13a-24a) on the ground that the *Boeing* decision had overruled the District Court's only basis for ordering consolidated arbitrations (App. B, p. 19a). Accordingly, it never reached the other issues presented as grounds to vacate the award (App. B, p. 24a). The District Court held that nothing in the record would sustain the notion that Petitioners and the London Reinsurers had consented to consolidation in the treaties or otherwise (App. B, p. 20a) and that there was no principled way to distinguish the case from *Boeing* (App. B, p. 21a). The District Court found that the Petitioners were not procedurally

barred from raising the issue of improper consolidation by failing to appeal from the District Court's order requiring consolidation, holding that "the 1988 amendments to the FAA, 9 U.S.C. § 16, cast doubt on the appealability of this Court's prior orders" (App. B, p. 22a). Moreover, the District Court stated that it always had power to revisit earlier rulings in a pending case where a fundamental change in governing law impacts directly on the parties' rights and obligations (App. B, p. 22a). Accordingly, the District Court vacated the award and directed the parties to proceed with separate arbitrations.

The Second Circuit's Reversal of the District Court

North River appealed the District Court's decision. The Court of Appeals reversed 3-0, holding that *Boeing* did not change the law of the Circuit, that the reinsurers' failure to appeal the 1991 decision consolidating the arbitrations at the time it was decided was fatal error, and that the balance of the equities required the award to stand. According to the panel, the District Court abused its discretion by reopening and changing its 1991 consolidation order (App. A, p. 2a). The Court of Appeals reasoned that this case "fits squarely within the definition of an 'independent proceeding' " (App. A, p. 6a) and that, accordingly, the order compelling consolidation was final and immediately appealable in 1991, even though the District Court had retained jurisdiction (App. A, p. 7a). Moreover, the Second Circuit panel held the District Court erred in departing from the law of the case for several reasons. First, the Court of Appeals said that *Boeing* did not truly change the law because *Boeing* relied on several Supreme Court decisions handed down after *Nereus* (App. A, p. 10a). Second, despite *Boeing*'s explicit language, the Court of Appeals stated, "[i]n a very real sense, *Boeing* did not overrule *Nereus*" (App. A, p. 10a), in part because the *Boeing* court did not disturb *Nereus* to the extent it relied on

general principles of equity and contract law (App. A, p. 10a). Thus, the Court of Appeals reasoned, "*Boeing* . . . explicitly left *Nereus* untouched to the extent that it relied on the equitable powers of the court" (App. A, p. 11a). The Court of Appeals concluded that the equities here required the award to stand. *Id.*

REASONS FOR GRANTING THE WRIT

The Second Circuit's opinion in this case represents a blatant example of the recurring problems caused throughout the circuits by the construction of § 16 of the FAA. While immediate appeals of orders issued in "independent" actions are permitted, appeals of orders issued in "embedded" actions must await the conclusion of the proceeding. It is unclear at best as to when an action is really independent or embedded. This confusion has wreaked havoc on litigants such as Petitioners who must, according to the rule the Second Circuit has established in this case, appeal every order compelling arbitration at the time it is rendered, even when it is not clear that it is appealable, thereby adding to the appellate courts' already overburdened workloads and imposing substantial and unnecessary costs on parties seeking to use the arbitration process. A litigant failing to undertake such an appeal runs the risk that at a later time, a court will determine that the order to arbitrate should have been appealed at the outset, and that the failure to do so is a waiver of the issue. And regardless of whether the law changes while the case is extant, the litigant apparently obtains no benefit from a change in law under the logic put forward by the Second Circuit, even though earlier court orders may directly conflict with the terms of the contract upon which an arbitration is based. This kind of ruling puts a substantial brake on the encouraging trend of the federal courts to promote alternative dispute resolution. Indeed, the Second Circuit's decision in this case conflicts with its own precedent and that of other circuits and this Court on the issue of when a court

may exercise its "equitable powers" and disregard the parties' wishes as expressed in the parties' agreement to arbitrate.

Petitioners respectfully suggest to the Court that this case presents urgent questions for resolution by this Court, questions which, if unanswered, will continue these peculiarities that do not have a sound legal basis and which have imposed significant costs and delays on the arbitration process.

I. SECTION 16(a)(3) OF THE FAA, AS INTERPRETED BY THE LOWER COURTS, IS CAUSING CONFUSION AS TO WHEN A DECISION IS APPEALABLE.

Section 16 is biased toward promoting arbitration. However, section 16(a)(3) of the FAA, 9 U.S.C. § 16(a)(3), provides that an appeal may be taken from "a *final decision* with respect to an arbitration that is subject to this title." (Emphasis supplied.) The words "final decision" create the essential quandary in the present case stemming from the outdated distinction between "embedded" and "independent" actions under the FAA, a quandary Section 16 was supposed to resolve.

Sections 16(a)(1) and (2) permit immediate appeals only from orders denying arbitration. Despite the pro-arbitration policy choice evident on the face of the statute, the lower courts in general and the Second Circuit in particular have essentially ignored that policy choice and instead opted to continue an outmoded and practicably unworkable distinction.

In this case, the Second Circuit reasoned that the institution of the case seeking arbitration was an "independent" action—an action only seeking arbitration (App. A, p. 6a). Thus, according to the Second Circuit, the order requiring consolidation (or perhaps the order appointing the umpire that was issued six weeks later) was a "final decision" from which an appeal should have been taken

under § 16(a)(3). The Second Circuit has reasoned that § 16 was not intended to change pre-existing law, holding that an order to arbitrate in an "independent" action is immediately appealable, while such an order in an "embedded" action, for example one seeking a declaratory judgment, as well as arbitration, is not. *See, e.g., Matter of Chung and President Enters. Corp.*, 943 F.2d 225, 228 (2d Cir. 1991). The legislative history of § 16, as is usually the case, is inconclusive, *see, e.g.*, 134 Cong. Rec. S16309 (daily ed. Oct. 14, 1988) (section-by-section analysis of 1988 amendments, submitted in lieu of Committee Report), and the statute on its face gives no indication that its intention was to continue the "independent-embedded" framework. Indeed, academic analysis of Section 16(a)(3) has divined no such intention.

> Given the nature of such orders, with the ever-present possibility of a return to court, an imaginative court of appeals might well hold that, unless the lower court makes clear that it intends to surrender all jurisdiction with its order to compel arbitration, it will be held not to have done so, and that the order is not therefore a final order for purposes of appeal.
>
> —4 Ian R. MacNeil, et al., *Federal Arbitration Law* § 43.2.5 at 43:32-43:33 (1994).

See also David D. Siegel, *Appeals from Arbitrability Determinations Under the New § 15 of the U.S. Arbitration Act*, 126 F.R.D. 589, 591 (1989) (Section 16(a)(3) may have meant to assure that only a final award is appealable); 15B Charles A. Wright, et al., *Federal Practice and Procedure* § 3914.17 at 25 (3d ed. 1992) ("The policy reflected in [§ 16(b) of the FAA] would be well served by denying appeal from any order compelling arbitration until the arbitration has been completed.").

A. The Independent-Embedded Distinction Wreaks Constant Confusion and Leads to Inconsistent Results.

As Petitioners discuss below, the proper role of § 16(a)(3) in the scheme of appealability of orders relating to arbitration is confused across the circuits. In the present case, however, there can be no doubt that the Second Circuit's decision worked a manifest injustice and was directly contrary to the rules of law concerning the FAA that this Court has established in recent years.

The FAA is merely intended to "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("*Byrd*"). The FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms," *Volt Info. Sciences v. Board of Trustees*, 489 U.S. 468, 478 (1989), "even if the result is 'piecemeal' litigation," *Byrd*, 470 U.S. at 221.

Despite this precedent, Second Circuit courts, until *Boeing*, had routinely held that regardless of the terms of the agreement between the parties, the court could always order consolidation of otherwise separate arbitrations because of the liberal rules of the FAA and in reliance on the Federal Rules of Civil Procedure. *Boeing*, 998 F.2d at 71. *Boeing* itself catalogued those decisions, and they included *this case*. *Id.* at 71-72 n.1. The *Boeing* court noted that "each of our sister circuit courts that has considered the question since [recent] Supreme Court decisions has held that district courts do not have the authority under the FAA to consolidate arbitrations *absent the parties' consent*." *Id.* at 72 (footnote omitted) (emphasis supplied).[1]

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[1] The Courts in the Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have interpreted the FAA to require that separate arbitrations not be consolidated in the absence of agreement by the

Here, in this "independent action" brought in 1991, before *Boeing*, Respondent sought consolidation and appointment of an umpire. The reinsurance treaties did not require consolidation, and Petitioners actively opposed consolidation. That consolidation caused prejudice to Petitioners, a point which the District Court did not reach when it vacated the award. The consolidation order was only the beginning of the process, since six weeks later the District Court appointed an umpire (App. C, pp. 25a-26a), and two years later the District Court ruled on cross-motions to vacate and confirm the arbitration award (App. B, pp. 13a-24a). Thus, a "final decision" might have arisen at any of these points in time. The District Court itself was uncertain. (App. B, pp. 21a-22a). No judgment was entered in 1991, and the court retained jurisdiction. Of course, if the proceeding had been termed "embedded," then the result would have been clear. No appeal would have been appropriate until the District Court issued a final decision under Sections 9 or 10 of the FAA.

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parties or authorization in the arbitration clause. A sampling of these opinions from a variety of circuits includes: *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (citing *Boeing* and noting that consolidation, absent the parties' agreement, is improper even when consolidation would promote the expeditious resolution of related claims); *American Centennial Ins. v. National Casualty Co.*, 951 F.2d 107, 108 (6th Cir. 1991) ("a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation"); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990) ("absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings"); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (per curiam) ("the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration"); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987) (same); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir.) (same), *cert. denied*, 469 U.S. 1061 (1984).

Indeed, in the Second Circuit and other circuits, deciphering when an appeal of an order relating to arbitration is permitted is metaphysical at best. For example, in *Filanto, S.P.A. v. Chilewich International Corp.*, 984 F.2d 58 (2d Cir. 1993), the question presented was "whether such an order [requiring arbitration] is appealable when it is entered in a lawsuit brought on the underlying dispute." *Id.* at 59. The complaint was not dismissed when arbitration was ordered, but the case was nonetheless marked closed. It was clear on the record that the district court intended to enter a final judgment. Since the court did not dismiss the complaint, and the plaintiff had sued on a contract even though the whole dispute was deemed subject to arbitration, the proceeding was held "embedded" rather than "independent" and an appeal was improper. *Id.* at 60. *Compare Matter of Chung and President Enters. Corp.*, 943 F.2d 225 (2d Cir. 1991).

A comparison of decisions across circuits and the facts of the present case suggest that the line between "independent" and "embedded" actions is opaque rather than bright and that no reasoned basis exists for the distinction. However, absent guidance from this Court, the plainly inconsistent results continue based on outmoded labels. *See, e.g., Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994) (even though district court dismissed remaining claims in embedded proceeding, order to arbitrate was not appealable); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994) (adopting rule that an embedded proceeding may not give rise to a final decision subject to immediate review, even when all the claims in which the arbitration issue is embedded are resolved); *Campbell v. Dominick & Dominick, Inc.*, 872 F.2d 358, 359 (11th Cir. 1989) (dismissing appeal from order compelling arbitration of all substantive claims in embedded action); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1273-76 (6th Cir. 1990) (finding appellate jurisdiction in embedded proceeding where order com-

pelling arbitration dismissed action rather than merely staying it); *Corion Corp. v. Chen*, 964 F.2d 55, 59-60 (1st Cir. 1992) ("*Corion*") (appeal of an order to arbitrate is premature even though the only substantive claim is for declaratory relief); *American Casualty Co. v. L-J, Inc.*, 35 F.3d 133, 139 (4th Cir. 1994) ("*American Casualty*") (same). Indeed, in *American Casualty*, the Fourth Circuit held:

> Dismissal of this appeal is particularly appropriate because the lower court clearly intended to retain its jurisdiction over the matter when it ordered the case "statistically stayed pending the outcome of arbitration between the parties." Its order merely rendered the case inactive until after the arbitration had resulted in an award at which time it could then enter a final judgment with respect to the very allegations raised by American in its first and last counts. *See Corion*, 964 F.2d at 56-58. An order compelling arbitration "in no way resolves the merits of the claims sent to arbitration;" rather, such an order is similar to the "hundreds of case-management orders in a large piece of litigation, any of which may affect the outcome, and almost none of which is appealable." Because a district court has review powers over the arbitral award, any assertedly erroneous actions by the district court (including the order compelling arbitration) are reviewable on appeal after the arbitration process has been completed.
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> —*American Casualty*, 35 F.3d at 139 (citations omitted).

It is against this background that Petitioners in the instant case faced the question of when an appeal was appropriate under § 16 of the FAA—a new statute which on its face was intended to promote arbitration and delay appeals until the conclusion of the arbitration proceeding. The Second Circuit itself has noted that the question of appealability of arbitration orders is "recurring." *Filanto*, 984 F.2d at 59. There can be no doubt that appeal-

ability of such an order is subject to considerable doubt and uncertainty. Indeed, as one court of appeals stated before the 1988 amendments to the FAA:

> The area of appealability of arbitration orders is one of "medieval if not Byzantine pecularities [sic]" and a "source of understandable confusion to the bar" where the law is constantly changing. In such an area of law, counsel cannot be expected to anticipate the twists and turns that the law may take.
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> —*Snyder v. Smith*, 736 F.2d 409, 414-15 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984) (citations and footnote omitted).

That Byzantine quality continues to exist under § 16 and will continue to exist until this Court clarifies the question of when a decision is "final" under § 16(a)(3).

B. The Present Distinction Between Independent and Embedded Actions Permits a Litigant to Affect the Other Party's Rights of Appeal at Will.

As noted above, several circuit court decisions have indicated that the appealability of an order compelling arbitration often turns on such vagaries as which party files suit. *See, e.g., American Casualty*, 35 F.3d at 137; *Corion*, 964 F.2d at 59-60. The independent-embedded distinction thus permits parties to engage in strategic pleading to permit or deny appealability of the arbitration issue at an early stage. It should not be the case that such significant results could turn on artful pleading or races to the courthouse.

For these various reasons, this case presents serious questions that require this Court's intervention to provide guidance on when a decision compelling arbitration is "final" under § 16(a)(3).

II. BY IGNORING THE AUTHORITY GRANTED THE DISTRICT COURT UNDER § 10 OF THE FAA AND MISAPPLYING THE LAW OF THE CASE DOCTRINE, THE DECISION BELOW NULLIFIES § 10 AND CREATES A CONFLICT BETWEEN CIRCUITS ON THE ISSUE OF CONSOLIDATION.

The emergence in recent years of alternative dispute resolution as a popular and common method of resolving disputes between parties has raised numerous procedural questions regarding the interpretation of the FAA. As discussed above, the interpretation of § 16 of the 1988 amendments to the FAA presents one significant area demanding resolution by this Court. Other questions of procedure—for example, the obligation of a district court to deny the consolidation of two separate arbitrations where the provisions of the arbitration agreement do not require consolidation and there has been no consent to consolidated proceedings by the parties—also lay at the heart of this case. The majority of cases addressing this consolidation issue have rejected the Second Circuit's long-standing precedent in *Nereus*.

The Second Circuit's 1993 decision in *Boeing* brought that court into line with these majority decisions and overruled its contrary ruling in *Nereus*. District courts within the Second Circuit welcomed *Boeing*'s clarification on the issue whether a district court can require consolidation absent agreement of the parties. The district court in *Active Glass Corp. v. Architectural & Ornamental Iron Workers Local Union 580*, 875 F. Supp. 245 (S.D.N.Y. 1995), applied the ruling in *Boeing*, finding that the decision "made clear that '[t]he district court is without authority to consolidate the two actions based upon the mere fact that the disputes contain similar or identical issues of fact and law,' " and " 'that the FAA does not authorize consolidation of arbitration proceedings unless doing so would be in accordance with the terms of

the agreement.'" *Id.* at 252 (citing *Boeing*, 998 F.2d at 70-71).[2]

In the present case, however, the Second Circuit turned the holding in *Boeing* on its head, refusing to accept the District Court's ruling that *Boeing* presented a controlling change in law which required it to revisit and reverse its earlier consolidation order. In addition, the Second Circuit rendered § 10 of the FAA a nullity by ignoring the District Court's authority to vacate the award under § 10(a)(4) of the FAA in a situation where a change in law invalidated its original consolidation order. The Second Circuit's interpretation on this issue disregarded the authority granted under § 10 and left the District Court without any avenue by which to correct an earlier ruling which was wrong. Finally, the decision below also ignored this Court's decisions in *Byrd* and *Volt*, by concluding that the District Court did, indeed, have power to consolidate under some unexplained "equitable powers" and that *Nereus*, to the extent it relied on the court's equitable powers had not, in fact, been overruled. In short, the Second Circuit's decision nullifies an important provision of the FAA, squarely conflicts with decisions of other circuit courts, and will create great confusion for subsequent courts addressing the question of consolidation. To remedy this conflict, this Court should grant this petition for writ of certiorari and reverse the decision of the Second Circuit below.

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[2] *Active Glass* also cited *Boeing's* statement that "[e]ach of our sister courts to have considered the question since [certain Supreme Court decisions] has held that district courts do not have the authority under the FAA to consolidate arbitrations absent the parties' consent." *Active Glass*, 875 F. Supp. at 252. Apparently, the district court in *Active Glass* interpreted *Boeing* as completely overruling the Second Circuit's contrary position in *Nereus*.

A. The Second Circuit's Decision Nullifies the Powers Granted the District Court Under § 10 of the FAA and Conflicts With Established Precedent Interpreting a District Court's Power Under the Section.

Section 10 of the FAA grants a district court the power to vacate an arbitration award, among other circumstances, "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). The District Court here recognized this authority as a valid alternate basis for its decision to vacate the arbitration award, which resulted from an earlier order to arbitrate which had become invalid as a result of the Second Circuit's *Boeing* decision. As explained by the District Court:

> I think that these rather special circumstances require vacatur of the award and a remand for separate arbitrations *de novo*, whether or not the case falls precisely within one of the grounds for vacatur specified in § 10 of the FAA. But if such a ground is necessary to the result, I conclude that the arbitrators in the consolidated arbitration exceeded the powers conferred upon them by the parties' contracts, in violation of § 10(d) [10(a)(4)]. To be sure, the arbitrators acted in fulfillment of this Court's Order; but *Boeing* makes it clear that, in all innocence, I exceeded my powers; and since the arbitrators derived their powers from my order, so did they.
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> —App. B, pp. 23a-24a.

In short, the District Court bolstered its conclusion that a traditional exception to the law of the case doctrine provided it with authority to revisit its earlier ruling with explicit authority to vacate the award founded in the FAA. Well-established judicial precedent further supports the District Court's interpretation of its authority under § 10 to vacate an award when arbitrators exceed their powers by conducting proceedings contrary to the parties' arbitration agreement. *See Avis Rent A Car Sys. v. Garage Employees Union*, 791 F.2d 22, 25 (2d Cir. 1986) ("award will not be enforced if the arbitrator is not

chosen in accordance with the method agreed to by the parties") (citation omitted); *Blue Bell, Inc. v. Western Glove Works, Ltd.*, 816 F. Supp. 236, 240 (S.D.N.Y. 1993) ("Awards which cannot be based upon the parties' contract will be vacated under Section 10(d) [10(a)(4)]"). *Accord, Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223 (4th Cir. 1994) (vacating award); *Waterspring, S.A. v. Trans Mktg. Houston, Inc.*, 717 F. Supp. 181 (S.D.N.Y. 1989).

Similar to its misapplication of the law of the case doctrine discussed below, the Second Circuit disregarded the power vested in the District Court under § 10(a)(4) and in essence ignored this issue. The decision below thus conflicts with established precedent holding that an award is properly vacated under § 10(a)(4) when inconsistent with the parties' arbitration agreement. *See Chasser v. Achille Lauro Lines*, 844 F.2d 50, 55 (2d Cir. 1988), *aff'd*, 490 U.S. 495 (1989).[3] According § 10 nothing more than passing mention in a footnote, the Second Circuit effectively rendered § 10(a)(4) meaningless. Although § 10(a)(4), on its face, appears to grant a district court precisely that authority exercised below, the Second Circuit's decision below in effect means that neither § 10, nor the law of the case doctrine, provides a district court with any avenue by which to go back and correct an earlier ruling which has become erroneous as a result of a change in law prior to final judgment in the case.

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[3] Other Circuits which have addressed this question agree with this position. *Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258 (9th Cir. 1992) (vacatur of award necessary when arbitrators exceeded their authority under § 10(d) [now § 10(a)(4)] by failing to provide findings of fact and conclusions of law as provided by the parties' contract); *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir. 1991) (award vacated as exceeding arbitrators' authority where parties' agreement provided for award by three arbitrators, but award rendered by only two).

More importantly, the Second Circuit decision conflicts with the clear dictates of this Court's decisions in *Volt* and *Byrd* requiring arbitrations to be conducted according to the precise terms of the parties' agreement even where the result is piecemeal litigation. As such, the power of the District Court to rely on § 10 as a ground to vacate an award made through the incorrect interpretation of the parties' arbitration agreement presents an important question of law which has not yet been addressed by this Court and for this reason, a writ of certiorari should issue.

B. The Second Circuit's Erroneous Application of the Law of the Case Doctrine Led It to an Incorrect Decision at Odds With Other Circuits and This Court.

The law of the case doctrine has deep-seated roots in this Court's judicial history. *See Messinger v. Anderson,* 225 U.S. 436 (1912). Well-established precedent from this Court has been sufficiently straightforward that lower courts have followed it with little deviation over the last century. Indeed, this Court has recently reaffirmed that a district court holds the power to revisit its earlier rulings before final judgment. *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 817 (1988); *accord, Arizona v. California,* 460 U.S. 605, 618 (1983) (dictum). In *Christianson,* this Court explained the power of a district court to revisit its earlier rulings:

> [T]he law-of-the-case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power." *Messinger v. Anderson,* 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L. Ed. 1152 (1912) (Holmes, J.) (citations omitted). *A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance,* although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was

> "clearly erroneous and would work a manifest injustice." *Arizona v. California, supra,* 460 U.S., at 618, n.8, 103 S.Ct., at 1391, n.8 (citation omitted). Thus, even if the Seventh Circuit's decision was law of the case, the Federal Circuit did not exceed its power in revisiting the jurisdictional issue, and once it concluded that the prior decision was "clearly wrong" it was obliged to decline jurisdiction.
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> —*Christianson,* 486 U.S. at 817 (emphasis supplied).

See also Higgins v. California Prune & Apricot Grower, Inc., 3 F.2d 896, 898 (2d Cir. 1924) (citing *Messinger*). The Second Circuit has applied the law of the case doctrine and upheld a district court's reversal of its earlier opinion prior to a final judgment. *Crane Co. v. American Standard, Inc.*, 603 F.2d 244, 248 (2d Cir. 1979). In *Crane,* some eight years after the start of litigation, following trial on the merits, the court held that an earlier decision was properly revisited in light of a change in the law.

Other Second Circuit decisions reinforce the discretionary power of the district court to revisit its prior rulings before final judgment. *See DiLaura v. Power Auth. of the State of N.Y.*, 982 F.2d 73, 76 (2d Cir. 1992) (citing *Arizona v. California,* 460 U.S. 616 (1983)). The major grounds justifying reconsideration are "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways v. National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.), *cert. denied,* 113 S. Ct. 67 (1992) (citations omitted). As summarized by the *DiLaura* court, the "law of the case [doctrine] 'permits a change of position if it appears that the court's original ruling was erroneous.' " *DiLaura,* 982 F.2d at 77.[4] The Second Circuit has not deviated

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[4] The law of other circuits is in accord. *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1197 (11th Cir.), *cert. denied,* 114 S. Ct. 604 (1993) ("law of the case 'permits

from this rule of law until its decision below. It is within the framework of this well-established line of cases that the decision below must be analyzed.

Despite the obvious relevance and clear mandate of these decisions, the Second Circuit's decision below failed even to consider or address any of them in ruling that the District Court abused its discretion in revisiting and reversing its earlier consolidation order. Instead, the court below relied on the Reinsurers' failure to appeal the consolidation order to reach its conclusion—despite the fact that nothing in any law of the case precedent suggests that an immediate appeal is necessary. In addition, the court below reached its decision based on a conclusion that *Boeing* had not, in fact, changed the law of the Circuit. This conclusion not only lacked any legal basis, but created an irreconcilable conflict, not only between the Second Circuit and other Circuits, but within the Second Circuit itself on the issue of consolidation.

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a change of position if it appears that the court's original ruling was erroneous' "); *Morris v. American Nat'l Can Corp.*, 988 F.2d 50, 52 (8th Cir. 1993) ("the law of the case does not apply when an intervening decision from a superior tribunal clearly demonstrates the law of the case is wrong"); *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 810 (9th Cir. 1991) ("law of the case does not bar reconsideration of an issue when 'controlling authority has since made a contrary decision of the law applicable to such issues' "); *Miles v. Kohli & Kahliher Assocs., Ltd.*, 917 F.2d 235, 241 n.7 (6th Cir. 1990) (same); *Barrington Press, Inc. v. Morrey*, 816 F.2d 341, 342 n.2 (7th Cir.), *cert. denied*, 484 U.S. 906 (1987) (same); *United States v. Carson*, 793 F.2d 1141, 1147 (10th Cir.), *cert. denied*, 479 U.S. 914 (1986) (the law of the case rule is to be applied at the sound discretion of the court to effectuate the proper administration of justice); *Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983) (law of the case doctrine is not a barrier to correction of judicial error; it is a rule of judicial convenience and utility and yields to adequate reason, allowing judge to reconsider decision so long as case remains in his court); *Zichy v. City of Philadelphia*, 590 F.2d 503, 508 (3d Cir. 1979) (court has a duty to apply a supervening rule of law despite prior decisions to the contrary when the new legal rule is valid and applicable to the issues of the case).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1007—August Term, 1994

(Argued March 16, 1995 Decided Aug. 21, 1995)

Docket No. 94-7784

THE NORTH RIVER INSURANCE COMPANY,
Petitioner-Appellant,

v.

PHILADELPHIA REINSURANCE CORPORATION; ASSICURAZIONI GENERALI; EXCESS AND CASUALTY REINSURANCE ASSOCIATION; and UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S and FOREIGN COMPANIES SUBSCRIBING TO SECOND EXCESS OF LOSS REINSURANCE CONTRACT No. R64939,
Respondents-Appellees,

THE REINSURANCE CORPORATION OF NEW YORK,
Intervenor-Defendant-Appellee.

Before OAKES, CARDAMONE and ALTIMARI, *Circuit Judges.*

OAKES, *Senior Circuit Judge*:

This appeal is by the North River Insurance Company ("North River") from a final order of the United States District Court for the Southern District of New York,

Charles S. Haight, Jr., *Judge*, denying a motion to confirm and granting a cross-motion to vacate an arbitration award on the grounds that an earlier order of the court consolidating two separate arbitrations into one was beyond the scope of the court's powers after our decision in *Government of United Kingdom of Great Britain v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993), thus invalidating the arbitration. Because *Boeing* did not, in a real sense, change the law of this circuit and because the reinsurers chose not to appeal the district court's original order consolidating the arbitrations, and because a balance of the equities requires that the award stand, the district court abused its discretion in reopening its prior order and vacating the arbitration award. Judgment reversed and case remanded.

BACKGROUND

North River insured GAF Corporation ("GAF") under a liability policy in effect for three annual policy periods commencing May 1, 1970. GAF was subsequently involved in many lawsuits in which it paid damages arising out of exposure to its asbestos products. North River's policy obligated it to cover such claims in the amount of $5 million in each of the three policy periods. Consequently, it paid out a total of $15 million to GAF.

Appellees are domestic and foreign reinsurers. The domestic reinsurers are Philadelphia Reinsurance Corporation, Reinsurance Corporation of New York, and Assicurazioni Generali and Excess and Casualty Reinsurance Association (the "U.S. reinsurers"). The foreign reinsurers are Underwriters and Underwriting Syndicates at Lloyd's of London, and foreign companies subscribing to reinsurance contract no. R64939 (the "London reinsurers"). The U.S. and London reinsurers, along with seven other reinsurers, reinsured GAF under so-called "treaty programs" in effect during the three annual policy periods at issue.

A reinsurance treaty is an ongoing contractual relationship between two insurance companies in which the pri-

mary insurer agrees in advance to cede, and the reinsurer to accept, specified business that is the subject of the contract. Under a treaty, a reinsurer agrees to indemnify a primary insurer with respect to a portion of the primary insurer's liability in a designated line of business. In this case, which is, apparently, typical, the reinsurance treaty involved the participation of many reinsurers, each accepting a percentage of the total liability under a single treaty.

The London reinsurers participated only in so-called "second layer treaties" involving a layer of $4 million of coverage in excess of a $1 million per occurrence. They agreed to an aggregate endorsement which gave North River certain options to combine products liability claims and submit them to the London reinsurers for coverage under various formulae. The aggregate endorsement was not included in the treaties to which the U.S. reinsurers subscribed.

North River, having paid GAF under its primary policies, presented claims to the reinsurers. While the seven other reinsurers paid North River, the U.S. and London reinsurers declined to pay claims, in whole or in part, contending that the asbestos claims arose from "multiple occurrences," while North River contended that only one occurrence was involved. Calculations in respect of the London reinsurers were further complicated by the effect of the aggregate endorsement.

In December 1988, North River commenced arbitration proceedings against the U.S. reinsurers, and on October 3, 1989, served a separate notice of intention to arbitrate against the London reinsurers.[1] The London reinsurers and the U.S. reinsurers chose the same arbitrator, and North River appointed the same arbitrator in both proceedings, but the two arbitrators were unable to choose a third. It was at that point, October 30, 1989, that North River commenced this independent proceeding pur-

[1] Each treaty at issue contained the same arbitration clause at Article XV thereof.

suant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (1994), seeking an order consolidating the two proceedings against the U.S. reinsurers and the London reinsurers, appointing a third arbitrator or "umpire," and compelling the reinsurers to proceed. The U.S. reinsurers and the London reinsurers, while having agreed to single arbitrations between the members of each group, objected to consolidation of the two separate proceedings before one panel of arbitrators.

In a memorandum opinion and order dated May 23, 1991, Judge Haight overruled the reinsurers' objections and ordered a consolidated arbitration, relying on *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976). *Nereus* held that under Fed. R. Civ. P., Rules 42(a) and 81(a)(3) and in light of the liberal purposes of the FAA, a district court could consolidate arbitration proceedings over the objection of the parties involved. *Id.* at 975. Judge Haight did not enter a judgment implementing this opinion, nor was he asked to do so by the parties, and while the U.S. reinsurers and the London reinsurers had opposed consolidation when the district court ordered it, they did not appeal the order. In a subsequently issued opinion and order dated July 19, 1991, the court appointed a third arbitrator and stated that the "Court will retain jurisdiction in the event of any post-award proceedings." The court again entered no judgment.

The arbitration proceeded on the consolidated basis as ordered by Judge Haight. Following discovery, hearings were held for four days in July 1993, and on October 21, 1993, the arbitration panel rendered a two-to-one award in North River's favor. On November 5, 1993, North River petitioned the district court to confirm the award under section 9 of the FAA, and on November 6, 1993, the U.S. and London reinsurers cross-moved under section 10 of the same act to vacate the award on the

strength of *Boeing*, 998 F.2d 68, which was issued on June 29, 1993. *Boeing* held that in a case in which the parties had agreed to arbitration in separate arbitration agreements, a district court may not order the arbitrations consolidated, absent the consent of the parties. *Id.* at 71-74.

The district court vacated the award and denied North River's motion to confirm it. *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 856 F. Supp. 850 (S.D.N.Y. 1994). The court noted that it was "not at all clear that this Court's May 23, 1991 opinion and order directing consolidation was appealable." *Id.* at 854. In any event, the court found, it had retained jurisdiction over the case to adjudicate any post-award applications, and had "not yet entered a final judgment." *Id.* at 855. "The Second Circuit has made it plain," the court stated, "that the law of the case doctrine may have no legitimate office to perform where a fundamental change in the governing law impacts directly upon the parties' rights and obligations." *Id.* The court held that "it is crystal clear that the Second Circuit's opinion in *Boeing* overrules that aspect of *Nereus* upon which [it] relied in directing a consolidated arbitration over the objections of the two groups of Reinsurers." *Id.* at 853. Consequently, the court vacated the order compelling a consolidated arbitration and the resulting arbitration award, and ordered two new, separate arbitrations. *Id.* at 855.

The court, lastly, held that the vacatur of the arbitration award was appropriate "whether or not the case falls precisely within one of the grounds for vacatur specified in § 10 of the FAA." *Id.* But, the court held, "if such a ground is necessary to the result . . . the arbitrators in the consolidated arbitration exceeded the powers conferred upon them by the parties' [] contracts, in violation of § 10(d)." *Id.* The court noted that "[t]o be sure, the arbitrators acted in fulfillment of this Court's order," but, the court continued, "*Boeing* makes it clear that . . . I

exceeded my powers; and since the arbitrators derived their powers from my order, so did they." *Id.*

North River appealed.

DISCUSSION

On appeal, North River contends that the district court's order compelling arbitration on a consolidated basis was a final, appealable order, giving it *res judicata* effect and making the law of the case doctrine inapplicable. Thus, North River argues, the district court erred in vacating the order and the resulting arbitration award.

Section 16 of the FAA, the section governing the appeal of orders concerning arbitration, distinguishes between orders issued in "independent" and in "embedded" proceedings. The section provides that if the suit is "independent," *i.e.*, the plaintiff seeks an order compelling or prohibiting arbitration or a declaration of whether a dispute is arbitrable, and no party seeks other relief, a final judgment ending the action is immediately appealable. 9 U.S.C. § 16(a)(3); *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993). We have interpreted this section to mean that "[i]f arbitration has been ordered, the objecting party need not await the outcome of the arbitration before challenging the order to arbitrate." *Id.*

However, if the suit is "embedded," *i.e.*, a party has sought some relief other than an order requiring or prohibiting arbitration, orders prohibiting arbitration are immediately appealable, 9 U.S.C. § 16(a)(1)(A)-(C); *Filanto*, 984 F.2d at 60, but orders directing arbitration are not immediately appealable, 9 U.S.C. § 16(b); *Filanto*, 984 F.2d at 60-61.

The case before us fits squarely within the definition of an "independent" proceeding. North River initiated this action under Sections 4 and 5 of the FAA, asking the district court to compel arbitration in its disputes with the

U S. and London reinsurers. No other relief was sought, either by North River or the reinsurers. *Cf. Filanto,* 984 F.2d at 61 (order compelling arbitration in a case claiming a breach of contract is an "embedded" proceeding). Thus, the district court's order compelling arbitration on a consolidated basis was a final order and was immediately appealable. *Id.* at 60.

This is so even though the district court refrained from entering a judgment on the July 1991 order and retained jurisdiction to deal with any post-award proceedings. *North River,* 856 F. Supp. at 855. Even where a district court retains jurisdiction to enforce an arbitration award, an order compelling arbitration in an independent proceeding is final and appealable. *University Life Ins. Co. v. Unimarc Ltd.,* 699 F.2d 846, 849-50 (7th Cir. 1983); *cf. General Reinsurance Corp. v. CIBA-Geigy Corp.,* 853 F.2d 78, 80 (2d Cir. 1988). With respect to the timing of a party's appeal, the entry of judgment is a ministerial act. *See* Fed. R. App. P. Rule 4(a)(2) ("A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry."); *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.,* 498 U.S. 269 (1991) (notice of appeal not fatally premature even though almost a month before entry of judgment).

As persuasively explained by Judge Posner:

> Th[is] situation actually is little different from what it would be if the district judge had not retained jurisdiction. If he had ordered arbitration, and left it at that, it would still be open to the parties . . . to go back to him for interpretation or modification of an order . . . and . . . if any of them prevailed before the arbitrators on any of their claims, to bring a fresh proceeding in the court below, under 9 U.S.C. § 9, to enforce the award. Yet if the district court had not formally retained jurisdiction, neither possibility would have made the order to arbitrate non-

> appealable. It should make no difference that, instead, the court, presumably to save the parties the bother of having to file separate actions if they want to modify or enforce the order compelling arbitration, formally retained jurisdiction . . . . The difference in procedures is minor, technical, and unrelated to the purpose of the final-judgment rule; it should not affect appealability.

University Life Ins., 699 F.2d at 850.

We find no merit in the contention of the U.S. and London reinsurers that they should not be penalized for their failure to appeal the district court's order because, at the time the order was issued, this circuit had not interpreted the 1988 amendments to the FAA which added Section 16 on appeals. As we noted in *Filanto*, 984 F.2d at 60, the distinction between "independent" and "embedded" proceedings in the 1988 amendments was not new law; it was, instead, a codification of an existing, court-created rule. *See, e.g., Manning v. Energy Conversion Devices, Inc.*, 833 F.2d 1096, 1101-02 (2d Cir. 1987) (citing, *inter alia, Chatham Shipping Co. v. Fertex S.S. Corp.*, 352 F.2d 291, 294 (2d Cir. 1965)). Likewise, it has long been the law in this circuit that an order compelling arbitration in an independent action is an appealable order. *Id.* at 1102.

While we find that the district court's order compelling arbitration on a consolidated basis was final for the purpose of appeal, we need not decide whether the order has *res judicata* effect. Even if the proceeding in the district court was, in some respect, open and still pending, and if we apply law of the case doctrine rather than *res judicata*, the district court nonetheless abused its discretion by reopening its decision to order a consolidated arbitration and by vacating the resulting arbitration award.

Under the doctrine of law of the case, "a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed,

becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time." *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987). It is generally accepted that the law of the case doctrine does not limit the power of a court, but " 'merely expresses the practice of courts generally to refuse to reopen what has been decided.' " *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Messinger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, *J.*)). But while a "court sometimes may review an earlier ruling, . . . [n]evertheless, because there is a strong policy favoring finality the court exercises its underlying power to review earlier rulings 'sparingly.' " *McClain v. United States*, 676 F.2d 915, 917 (2d Cir.) (citations omitted), *cert. denied*, 459 U.S. 879 (1982). A court should be "loathe" to revisit an earlier decision "in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.' " *Christianson*, 486 U.S. at 817 (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)).

In its opinion, the district court correctly points out that we have held that a court may depart from the law of the case "where a fundamental change in the governing law impacts directly upon the parties' rights and obligations." *North River*, 856 F. Supp. at 855 (citing *Crane Co. v. American Standard, Inc.*, 603 F.2d 244 (2d Cir. 1979)). We have also held, however, that the law of the case should be "disregarded only when the court has a clear conviction of error with respect to a point of law on which its previous decision was predicated." *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) (citations and internal quotations omitted), *cert. denied*, 459 U.S. 828 (1982). "[M]ere doubt . . . is not enough to open the point for full reconsideration." *Id.* (internal quotations and citation omitted).

Here, after the consolidated arbitration had already taken place, the district court reopened its decision to consolidate—a decision which the U.S. and London reinsurers did not appeal—because it found that our *Boeing* case had fundamentally changed the law of this circuit. *North River*, 856 F. Supp. at 855. However, *Boeing* did not truly act to change the law in this circuit. Instead, in *Boeing*, 998 F.2d at 72, we applied Supreme Court cases, namely *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), which had been handed down after *Nereus* but before the district court in this case ordered arbitration on a consolidated basis.

In a very real sense, *Boeing* did not overrule *Nereus*. First, the facts of *Boeing* are distinguishable in a significant way from those in *Nereus*: in *Boeing*, the parties had entered into separate contractual agreements to arbitrate, while in *Nereus* the parties were bound by the same arbitration agreement. Thus, it is entirely unclear whether the outcome of a case factually similar to *Nereus* would, after *Boeing*, be any different than it was in *Nereus* before *Boeing*.[2] Second, while in *Boeing* we held that *Nereus* was "no longer good law" to the extent that it was "based on the Federal Rules of Civil Procedure and the 'liberal purposes' of the Federal Arbitration Act," we also noted that "[w]e do not disturb *Nereus* to the extent it is based on the general equitable powers of the court and principles of contract law." *Boeing*, 998 F.2d at 74. Certainly equitable principles allow for confirmation of an award in a consolidated proceeding already had, especially when

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[2] This case, to a certain extent, falls somewhere between *Nereus* and *Boeing*. While the district court found that each reinsurer entered into separate agreements with North River, *North River*, 856 F. Supp. at 853-54, the arbitration clause in each agreement was identical, and the agreements were part of a single reinsurance treaty program.

the parties did not appeal from the order of consolidation. Third, *Boeing* was not reheard *in banc*, nor were any of the Second Circuit's procedures followed for changing the law of the circuit.

Boeing does not mandate that the district court's consolidation order be vacated in this case, after the arbitration has already gone forward. The *Boeing* court explicitly left *Nereus* untouched to the extent that it relied on the equitable powers of the court, 998 F.2d at 74, and the equities in this case require that the award from the consolidated arbitration stand. Extensive discovery has already been had in the consolidated case, and the arbitration proceedings have been completed. The U.S. and London reinsurers chose not to challenge the consolidation on direct appeal.

In addition, the *Boeing* decision came down on June 29, 1993, some weeks before commencement of the arbitration hearing and almost two months before the August 1993 award against appellees. Even if learned counsel for the reinsurers did not read the slip sheet opinions of the Second Circuit or the West advance sheets which did not come down until September, certainly the *Boeing* decision was available electronically. Beyond this, it was the subject of substantial publicity and discussion in the legal community. *See* Deborah Pines, *Consolidation of Arbitrations Invalidated; 2nd Circuit Panel Clarifies Question Splitting Judges,* N.Y.L.J., July 8, 1993, at 1; Lawrence W. Newman & Michael Burrows, *Consolidation of Arbitrations,* N.Y.L.J., July 29, 1993, at 3. Though our opinion does not turn on this sequence of events, it provides support for our conclusion that the reinsurers should be bound by the award in the consolidated arbitration.

Thus, because *Boeing* did not, in a real sense, change the law of this circuit and because the reinsurers chose not to appeal the district court's original order consolidating the arbitrations, and because a balance of the equities requires that the award stand, the district court abused its

discretion in reopening its prior order and vacating the arbitration award.[8]

CONCLUSION

The district court erred in reopening its decision to order arbitration on a consolidated basis and in vacating the resulting arbitration award. The judgment is reversed and the case is remanded to the district court for the resolution of any outstanding proceedings.

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[8] The U.S. and London reinsurers contend that the district court had the power to vacate the arbitration award under section 10(a)(4) of the FAA, which allows a district court to vacate an award "[w]here the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). This argument fails because section 10 does not provide an independent means of challenging the district court's order compelling a consolidated arbitration which was appealable, but which was not appealed.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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90 Civ. 7002 (CSH)

IN THE MATTER OF THE ARBITRATION BETWEEN

THE NORTH RIVER INSURANCE COMPANY,
Petitioner,

-against-

PHILADELPHIA REINSURANCE CORPORATION, ASSICURAZIONI GENERALI, EXCESS AND CASUALTY REINSURANCE ASSOCIATION, and UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S AND FOREIGN COMPANIES SUBSCRIBING TO SECOND EXCESS OF LOSS REINSURANCE CONTRACT NO. R64939,
Respondents.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Following an award rendered at the conclusion of a consolidated arbitration, the prevailing insurance company petitions to confirm the award. Respondents, the two groups of reinsurers against whom the award was rendered, cross-move to vacate it. They contend that this Court's order of consolidation was improvidently made, requiring vacatur; and that events occurring during the arbitration hearings demand the same result. Because I agree with respondents that recent Second Circuit authority condemns consolidation on the facts of this case, I vacate the award on that ground and reach no other issue.

Background

Petitioner North River Insurance Company ("North River") insured the GAF Corporation ("GAF"), an asbestos manufacturer, under a liability policy in effect for three annual policy periods from May 1, 1970 through April 30, 1973. During the 1980's GAF was sued in many lawsuits alleging injury from exposure to its asbestos products. North River's policy obligated it to cover such claims in the amount of $5 million for each of these three policy periods. In consequence it has paid out a total of $15 million to GAF.

Respondents are domestic and foreign reinsurers who, together with seven other reinsurers, reinsured North River under reinsurance treaty programs in effect during the three GAF annual policy periods in suit. The treaties provided a first layer of reinsurance coverage in the amount of $750,000 in excess of a $250,000 "per occurrence" retention (or deductible), and a second layer of $4,000,000 in excess of a $1,000,000 "per occurrence" retention (the first layer of coverage). A reinsurance treaty involves an ongoing contractual relationship between insurance companies, in which the primary insurer agrees in advance to cede, and the reinsurer to accept, specified business that is the subject of the contract. Typically, as in this case, a reinsurance treaty involves the participation of many reinsurers, each accepting a percentage of the total liability under a single treaty.

The present respondents fall into two groups. The "U.S. Reinsurers" include respondents Philadelphia Reinsurance Corporation, Assicurazioni Generali, Excess and Treaty Management Corporation (on behalf of the members of Excess and Casualty Reinsurance Association), and The Reinsurance Corporation of New York. The "London Reinsurers" include respondents Underwriters and Underwriting Syndicates at Lloyd's and Foreign Companies Subscribing to Second Excess of Loss Reinsurance Contract No. R64939. I shall hereafter refer to respondents by their respective group names.

A reinsurer signifies its participation in a reinsurance treaty by subscribing to the treaty. In the case at bar the London Reinsurers participated only in the second layer treaties. They agreed to an "aggregate endorsement" which became a part of the treaties subscribed to by those reinsurers. The aggregate endorsement gave North River certain options in combining products liability claims and submitting them to the London Reinsurers for coverage under different formulae. The aggregate endorsement was not included in the treaties to which the U.S. Reinsurers subscribed.

Each reinsurance treaty contained an arbitration clause, appearing in Article XV, which provided:

> IF ANY DISPUTE SHALL ARISE BETWEEN THE REINSURED AND THE REINSURER WITH REFERENCE TO THE INTERPRETATION OF THIS CONTRACT OR THEIR RIGHTS WITH RESPECT TO ANY TRANSACTION INVOLVED, THE DISPUTE SHALL BE REFERRED TO THREE ARBITRATORS, ONE TO BE CHOSEN BY EACH PARTY AND THE THIRD BY THE TWO SO CHOSEN. IF EITHER PARTY REFUSES OR NEGLECTS TO APPOINT AN ARBITRATOR WITHIN THIRTY (30) DAYS AFTER THE RECEIPT OF WRITTEN NOTICE FROM THE OTHER PARTY REQUESTING IT TO DO SO, THE REQUESTING PARTY MAY NOMINATE TWO ARBITRATORS WHO SHALL CHOOSE THE THIRD. EACH PARTY SHALL SUBMIT ITS CASE TO THE ARBITRATORS WITHIN THIRTY (30) DAYS OF THE APPOINTMENT OF THE ARBITRATORS. THE ARBITRATORS SHALL CONSIDER THIS CONTRACT AN HONORABLE ENGAGEMENT RATHER THAN MERELY A LEGAL OBLIGATION: THEY ARE RELIEVED OF ALL JUDICIAL FORMALITIES AND MAY ABSTAIN

FROM FOLLOWING THE STRICT RULES OF LAW. THE DECISION OF A MAJORITY OF THE ARBITRATORS SHALL BE FINAL AND BINDING ON BOTH THE REINSURED AND THE REINSURER. THE EXPENSE OF THE ARBITRATORS AND OF THE ARBITRATION SHALL BE EQUALLY DIVIDED BETWEEN THE REINSURED AND THE REINSURER. ANY SUCH ARBITRATION SHALL TAKE PLACE IN NEW YORK, NEW YORK, UNLESS SOME OTHER LOCATION IS MUTUALLY AGREED UPON BY THE REINSURED AND THE REINSURER.

North River, having paid under its primary policies with GAF, presented claims under the treaties as it construed them to the reinsurers. The present respondents rejected North River's claims in whole or in part. A principal bone of contention related to the meaning of "single occurrence" as that phrase was used in the treaties to define North River's "retention," *i.e.*, the deductible amount. North River contended that only one occurrence was involved, namely, GAF's manufacture and sale of asbestos products, and hence only one $250,000 retention applied. The respondents contended that the asbestos claims arose from multiple occurrences, each subject to a $250,000 retention. The calculation in respect of the London Reinsurers was further complicated by the effect of the aggregate endorsement.

In December 1988, North River commenced arbitration proceedings against the four U.S. Reinsurers, who retained the same counsel to defend them, appointed the same arbitrator, Joseph F. Murphy, and by their conduct agreed to a consolidated arbitration between themselves and North River, which had appointed Vincent Vaccarello as its arbitrator. On October 3, 1989 North River served a separate notice of intention to arbitrate upon the Lon-

don Reinsurers. North River again appointed Mr. Vaccarello as its arbitrator. The London Reinsurers retained different counsel from those defending the U.S. Underwriters, but appointed Mr. Murphy as their arbitrator. It may therefore be said that the London Reinsurers agreed to a consolidated arbitration between North River and themselves.

The case first came to the attention of this Court when North River filed a petition dated October 30, 1990 under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* North River complained of the delay in selecting a third arbitrator. One sticking point arose from Mr. Murphy's insistence, in responding to the correspondence from Mr. Vaccarello, that he was speaking only for the U.S. Reinsurers, the London Reinsurers having not yet instructed him on the question of the third arbitrator. In these circumstances, North River petitioned the Court under FAA § 4 for an order directing that its arbitration with the U.S. Reinsurers be consolidated with the London Reinsurers arbitration, and appointing a third arbitrator to participate in that consolidated arbitration.

The U.S. Reinsurers and the London Reinsurers, while having agreed to a single arbitration between North River and the members of those respective groups, objected to a further consolidation of the U.S. Reinsurers and London Reinsurers arbitrations into a single proceeding before one panel of arbitrators. Respondents based that objection upon various perceived disadvantages to their respective defensive positions.

In a Memorandum Opinion and Order dated May 23, 1991, I overruled the Reinsurers' objections and ordered a consolidated arbitration. I did so specifically on the authority of the Second Circuit's decision in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 939 (1976), which in the context of a maritime contract of charterparty and a third-party guarantor of performance

directed a consolidated arbitration "in the interest of justice" because "[t]here were not only common questions of law and fact in the two arbitrations but there was danger of conflicting findings. . ." *Id.* at 976 (cited and quoted in this Court's May 23, 1991 opinion at slip op. 2-3).

The May 23, 1991 opinion also specified procedures that would be followed if Messrs. Vaccarello and Murphy could not agree on the third member of the consolidated arbitration panel.

I did not enter a judgment implementing the May 23, 1991 opinion; nor was I asked to do so. Everyone awaited developments. Messrs. Vaccarello and Murphy could not agree on a third arbitrator. This Court, following the procedures outlined in the May 23, 1991 opinion, appointed Mr. David J. Sherwood as third arbitrator in a Memorandum Opinion and Order dated July 19, 1991 which concluded with the sentence: "This Court will retain jurisdiction in the event of any post-award proceedings." I entered no judgment in respect of this opinion.

Following discovery, the hearings before the arbitrators began on July 9, 1993 and were concluded on July 12. On October 21, 1993, the arbitration panel rendered a 2-1 award in North River's favor. Mr. Murphy dissented.

On November 5, 1993 North River petitioned this Court under § 9 of the FAA to confirm the award. On November 6, 1993 the U.S. Reinsurers and London Reinsurers cross-moved under FAA § 10 to vacate it.

The Reinsurers' first ground for vacatur arises out of the Second Circuit's overruling of *Nereus* in *The Government of the United Kingdom of Great Britain v. The Boeing Company*, 998 F.2d 68 (2d Cir. 1993). The Second Circuit decided *Boeing* on June 29, 1993. West

first published the opinion in its advance sheets dated September 13, 1993. Presumably at an earlier date the opinion's text was available on-line through both Westlaw and Lexis. The court of appeals also disseminates printed slip opinions.

As alternative grounds for vacatur, respondents complain of the arbitrators' refusal to hear the testimony of one of their witnesses, and a reference by North River's counsel during the hearings to an earlier arbitration involving another of the GAF reinsurers, in alleged violation of an agreement governing the conduct of the arbitration at bar.

Discussion

Notwithstanding North River's protestations to the contrary, it is crystal clear that the Second Circuit's opinion in *Boeing* overrules that aspect of *Nereus* upon which I relied in directing a consolidated arbitration over the objections of the two groups of Reinsurers.

In *Boeing* the Second Circuit acknowledged *Nereus*'s conclusion "that the FAA's 'liberal purposes' and the Federal Rules of Civil Procedure allow us to consolidate arbitration proceedings absent consent." 998 F.2d at 71. In footnote 1 on that page the court of appeals collects a number of district court cases directing consolidated arbitrations on the strength of the *Nereus* conclusion; my May 23, 1991 opinion in the instant case is one of them. But that conclusion, the court of appeals squarely holds in *Boeing*, "is no longer good law." *Id.* The rule in this circuit now is that "the district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation." *Id.* at 74. It is profitless for a district judge to analyze how the court of appeals arrived at that conclusion. I am bound by it.

In the case at bar the two groups of Reinsurers opposed consolidation. *Boeing* therefore impacts upon the case

unless it can be said that all the respondent Reinsurers were bound by the same agreement to arbitrate, or that in some manner they agreed to consolidation, notwithstanding their opposition at the time of North River's first petition to this Court.

I do not think that either proposition can be sustained. While each Reinsurer subscribed to the same treaty, the resulting arrangement was a number of separate contracts between the primary insurer on the one hand and, on the other, each reinsurer for its individually designated percentage of the total treaty liability. Those separate contracts are capable of amendment or change in manners binding only on some reinsurers and not on others; the aggregate endorsement negotiated by North River and the London Reinsurers illustrates that principle. The contractual liability of reinsurers under a reinsurance treaty is traditionally regarded as several, not joint. *See* U.S. Reinsurers' Reply Brief at 9 n.7.

Nor can the Reinsurers at bar be said to have agreed to a consolidated arbitration in their separate contracts. While the arbitration clause is the same in each subscribed treaty, it speaks in terms of disputes arising between "the reinsured and the *reinsurer*" (I have emphasized the singular form of the noun). North River did not suggest in its original petition to compel consolidation that the Reinsurers had contractually agreed to it; nor could it plausibly have done so. When a primary insurer and its several reinsurers wish to provide in their contracts for multi-party arbitration having the practical effect of consolidation, they know how to do so. Indeed, in 1981 the arbitration clause in the treaties at issue in this case was amended to provide that "[i]f more than one reinsurer is involved in the same dispute, all such reinsurers shall act as one party for purposes of this clause," an amendment which goes on to provide explicitly that it shall not be construed as "changing the liability of the reinsurers under the terms of this contract from several to joint." U.S. Reinsurers'

Reply Brief at 9 n.7. If by operation of law the Reinsurers had agreed to consolidated arbitration under the previously existing arbitration clause, there would have been no need to amend it.

Therefore I conclude that there is no principled way to distinguish the case at bar from *Boeing*. Surely in *Boeing* there were factors which under a "liberal" construction of the FAA militated in favor of consolidation. The case arose out of damage during ground testing to a helicopter owned by the United Kingdom. Boeing built the helicopter and Textron, Inc. built its engine. Presumably each company blamed the other for the accident, although the court of appeals' opinion does not say so expressly and the district court proceedings were sealed. Boeing and Textron had separate contracts with the United Kingdom containing identical arbitration clauses. The United Kingdom asked Boeing and Textron to agree to a consolidated arbitration. The desired benefits to the United Kingdom were apparent, including the avoidance of inconsistent awards. Boeing refused. The United Kingdom petitioned this Court (Stanton, J.) to order a consolidated arbitration. Judge Stanton did so, on the authority of *Nereus*, entered judgment accordingly, and stayed his judgment pending appeal. The Second Circuit overruled *Nereus* and reversed. The case at bar cannot be distinguished from *Boeing*.

The remaining question is whether respondents are procedurally barred from raising the point. North River says that the Reinsurers' failure to appeal from this Court's May 23 and July 19, 1991 opinions and orders calls into play the law of the case doctrine, so that the consolidated arbitration directed by the May 23 opinion is invulnerable to attack. In addition, North River contends that the particular circumstances of this case do not fall within the FAA's limited grounds for vacating an award; and that the Reinsurers are barred by the equitable doctrines of waiver and estoppel. These arguments are not persuasive.

It is not at all clear that this Court's May 23, 1991 opinion and order directing consolidation was appealable. In *Boeing* Judge Stanton entered a judgment on his consolidation order; the court of appeals concluded that in that circumstance it had jurisdiction under 28 U.S.C. § 1291. In *Nereus* the court of appeals did not articulate the basis for its jurisdiction over the unsuccessful appeal from the district court's consolidation order. Perhaps the court regarded it as an interlocutory decree in an admiralty case, appealable under § 1292(a)(3). The case at bar is not an admiralty case. In any event, the 1988 amendments to the FAA, 9 U.S.C. § 16, cast doubt on the appealability of this Court's prior orders. § 16(b)(2) provides that except as otherwise provided in 28 U.S.C. § 1292(b), an appeal may not be taken from an interlocutory order "directing arbitration to proceed under section 4 of this title." In its original petition North River invoked 9 U.S.C. § 4, and my May 23, 1991 order directed "arbitration to proceed" in a consolidated form. Certification of an interlocutory appeal under § 1292(b) was neither sought nor granted.

Quite apart from these technicalities, the Second Circuit has made it plain that the law of the case doctrine may have no legitimate office to perform where a fundamental change in the governing law impacts directly upon the parties' rights and obligations. *See Crane Co. v. American Standard, Inc.*, 603 F.2d 244 (2d Cir. 1979) (law of case doctrine did not require court of appeals to adhere to its prior holding that securities plaintiff had standing to sue, in light of Supreme Court's subsequent ruling that such plaintiffs lacked standing). The rationale of *Crane* renders inconsequential whether my May 23, 1991 order should be regarded as final or interlocutory, a question on which the parties expend much energy in their briefs. I apply the reasoning of *Crane* to the case at bar. I retained jurisdiction over this case to adjudicate any post-award applications. I am now presented with cross-motions to confirm and vacate the award. This court has not yet entered a final judgment. The Second Circuit's

decision in *Boeing* announces a fundamental change, binding upon me, in that court's view of the propriety of consolidated arbitrations. What *Nereus* praised and encouraged, *Boeing* casts into outer darkness beyond hope of redemption. My order of consolidation, while correct under *Nereus*, must be perceived in the light of *Boeing* as improvidently made. Absent their consent, respondents could not legally be forced into a consolidated arbitration. They are entitled to redress at the hands of this court.

North River's invocation of waiver and estoppel depends primarily on the timing of the *Boeing* decision, dated June 29, 1993. North River chides respondents for keeping the decision and its rationale up their sleeves until the award came down against them on August 21, 1993. But the law reporting company upon which the profession relies did not publish *Boeing* in written form until September 13, 1993, after the award. It is in such advance sheets that recently decided cases are for the first time indexed and cross-referenced with respect to statute, rule and subject matter. The respondents' reply papers stop short of claiming that counsel did not know of the *Boeing* decision until after the award; and it was possible for them to learn of it earlier, through slip opinions disseminated by the court of appeals or the electronic marvels of this new computerized age. But the arbitration hearings, after prolonged discovery, were scheduled to begin on July 9, 1993, only ten days after the Second Circuit decided *Boeing*. I see nothing in this chronology or in any of the other circumstances of the case sufficient to raise an equitable bar against the relief respondents seek.

I think that these rather special circumstances require vacatur of the award and a remand for separate arbitrations *de novo*, whether or not the case falls precisely within one of the grounds for vacatur specified in § 10 of the FAA. But if such a ground is necessary to the result, I conclude that the arbitrators in the consolidated arbitration exceeded the powers conferred upon them by the parties' contracts, in violation of § 10(d). To be sure,

the arbitrators acted in fulfillment of this Court's order; but *Boeing* makes it clear that, in all innocence, I exceeded my powers; and since the arbitrators derived their powers from my order, so did they.

Since there must be new and separate arbitrations, I do not reach the respondents' alternative grounds for vacatur based upon alleged improprieties in the conduct of the prior arbitration hearings.

It is in one sense regrettable that the time and resources expended on the first arbitration may have been partially wasted, although one hopes that by stipulation or otherwise much of the evidence discovered and presented may be utilized at the new arbitrations. However, the governing principle must be that declared by the Second Circuit in *Boeing* at 998 F.2d 70: "[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms" (citing and quoting *Volt Info. Sciences v. Board of Trustees*, 489 U.S. 468, 478 (1989)). Because the respondents at bar did not agree to a consolidated arbitration and objected to its imposition upon them, I am compelled to vacate the award. I have considered all of North River's arguments. They do not alter this conclusion.

For the foregoing reasons, the petitioner to confirm the arbitration award is denied. Respondents' cross-motion to vacate the award is granted. The parties are directed to proceed with separate arbitrations consistent with this Opinion. This Court retains jurisdiction.

It is SO ORDERED.

Dated: New York, New York
July 13, 1994

/s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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90 Civ. 7002 (CSH)

IN THE MATTER OF THE ARBITRATION BETWEEN
THE NORTH RIVER INSURANCE COMPANY
Petitioner,

-against-

PHILADELPHIA REINSURANCE CORPORATION, ASSICURAZIONI GENERALI, EXCESS AND CASUALTY REINSURANCE ASSOCIATION, and UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S AND FOREIGN COMPANIES SUBSCRIBING TO SECOND EXCESS OF LOSS REINSURANCE CONTRACT No. R64939,
Respondents.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Counsel for the parties have forwarded to the Court the names of two potential third arbitrators. They have followed the procedure directed in the Court's Memorandum Opinion and Order dated May 23, 1991, at slip op. 4.

The two candidates are Mr. Paul R. Whitters and Mr. David J. Sherwood.

I have considered the resumes of these two gentlemen, and the comments that counsel offer concerning them. The most recent correspondence of counsel reflects a consensus, amply justified, that both Mr. Whitters and Mr.

Sherwood are well qualified to serve as an arbitrator in this important case, and I am grateful to both of them for their willingness to serve.

I must perforce choose one or the other. After careful consideration, the Court designates David J. Sherwood as the third arbitrator.

I direct the arbitration to go forward in accordance with the provisions of the May 23, 1991 Memorandum Opinion and Order.

The Clerk of the Court is directed to place this case on the suspense docket. This Court will retain jurisdiction in the event of any post-award proceedings.

It is SO ORDERED.

Dated: New York, New York
July 19, 1991

/s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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90 Civ. 7002 (CSH)

IN THE MATTER OF THE ARBITRATION BETWEEN
THE NORTH RIVER INSURANCE COMPANY
Petitioner,

-against-

PHILADELPHIA REINSURANCE CORPORATION, ASSICURAZIONI GENERALI, EXCESS AND CASUALTY REINSURANCE ASSOCIATION, and UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S AND FOREIGN COMPANIES SUBSCRIBING TO SECOND EXCESS OF LOSS REINSURANCE CONTRACT No. R64939,
Respondents.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Arbitration is intended to achieve prompt and inexpensive resolution of commercial disputes. But this petition under the Federal Arbitration Act, 9 U.S.C. §§ 4 and 5, and its related motions, cross-motions, and counterclaims, give further proof, if more were needed, that even getting an arbitration under way can be time-consuming and expensive.

This Memorandum and Order resolves all pending motions. As Judge Medina said in somewhat comparable circumstances: "It is our hope that the parties will now get down to business." *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 976 (2d Cir. 1975).

I.

The motion of Reinsurance Corporation of New York ("ReCo") to intervene in this statutory "equitable proceeding," *Nereus, supra,* at 974, is granted under Rule 24(b)(2), Fed.R.Civ.P. The procedural objection to intervention made by North River Insurance Company, that at the time of its motion to intervene ReCo was not involved in an arbitration with North River, was frail at best, and is in any event mooted by ReCo's recently filed notice of arbitration.

II.

ReCo has appointed Joseph Murphy as its arbitrator, and has consented in advance to North River's naming Vincent Vaccarello as its arbitrator. These are the same arbitrators appointed by North River on the one hand and the U.S. Reinsurers (Philadelphia Reinsurance Corporation, Assicurazioni Generali, and Excess and Casualty Reinsurance Association) on the other hand. In these circumstances, I direct the consolidation of the North River-ReCo arbitration with the arbitration between North River and the U.S. Reinsurers.

III.

I also direct that this arbitration be consolidated with North River's arbitration with the London Reinsurers. I make that further order of consolidation on the authority of *Nereus* and the factors articulated by the Second Circuit at 527 F.2d 974: "That the consolidation was in the interest of justice is overwhelmingly demonstrated. There were not only common questions of law and fact in the two arbitrations but there was danger of conflicting findings . . ."

In the case at bar, there is no sound reason to risk conflicting findings as to the proper definition of "occurrence" as that word appears in Article VI of the reinsurance treaty. While the aggregate extension endorsement of the London Reinsurers amends Article V in a manner

unique to those underwriters, the crucial Article VI definition is common to both treaties; and the sophisticated panel of arbitrators which will hear the cases should be able without difficulty to address any additional questions peculiar to the London Reinsurers. The benefits of a consolidated arbitration far outweigh any complications arising from a peripheral difference in the treaties.

Because the London underwriters have also selected Mr. Murphy as their arbitrator, I do not confront the issue of composition of the consolidated arbitration panel which the Second Circuit had to resolve in *Nereus* at 975-76.

There is no substance to the London Reinsurers' contention that North River's limited prior participation in proceedings under the N.Y. CPLR divest this Court of jurisdiction, or preclude North River from invoking the Federal Arbitration Act. *See Sears Roebuck & Co. v. Glenwal Co.*, 325 F. Supp. 86 (S.D.N.Y. 1970) (Weinfeld, J), *aff'd*, 442 F.2d 1350 (2d Cir. 1971).

IV.

The consolidated arbitration panel will be completed in the manner suggested as an alternative by the U.S. Reinsurers in their reply brief dated January 19, 1991 at 11-13. The arbitration clause provides that "the dispute shall be referred to three arbitrators, one to be chosen by each party and the third by the two so chosen." As noted *supra*, North River selected Mr. Vaccarello as its arbitrator, and all the reinsurers in the arbitrations, now consolidated, selected Mr. Murphy as their arbitrator. Accordingly, under the arbitration agreements, it is the responsibility of Messrs. Vaccarello and Murphy to choose the third arbitrator if they can. Indeed, I will given [sic] them an additional twenty (20) days from the date of this Memorandum and Order to attempt to do so. If they cannot, then I direct that within thirty (30) days of the date of this Memorandum and Order, Messrs. Vaccarello

and Murphy exchange lists of three proposed arbitrators. They are not limited to names previously submitted. I free them from that limitation because I have expanded the boundaries of the consolidated arbitration. Fifteen (15) days after the exchange of these lists, each arbitrator may strike two candidates from the other arbitrators' list. The remaining names, together with appropriate biographical material, will then be forwarded forthwith to the Court for selection of the third arbitrator.

My hope is that Messrs. Vaccarello and Murphy may yet be able to agree on the third arbitrator, which was the intent of the arbitration agreements; but if they cannot, this procedure will accomplish the task with a minimum of delay.

It is SO ORDERED.

Dated: New York, New York
May 23, 1991

CHARLES S. HAIGHT, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE LANGE III
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of October one thousand nine hundred and ninety-five.

94-7784

THE NORTH RIVER INSURANCE COMPANY,
Petitioner-Appellant,

v.

PHILADELPHIA REINSURANCE CORPORATION, ASSICURAZIONI GENERALI, EXCESS AND CASUALTY REINSURANCE ASSOCIATION, and UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S AND FOREIGN COMPANIES SUBSCRIBING TO SECOND EXCESS OF LOSS REINSURANCE CONTRACT NO. R64939,
Respondents-Appellees,

THE REINSURANCE CORPORATION OF NEW YORK,
Intervenor-Defendant-Appellee.

A petition for rehearing having been filed herein by Appellee: Philadelphia Reinsurance Corporation et al.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

GEORGE LANGE III
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of August, one thousand nine hundred and ninety-five.

PRESENT: HON JAMES L. OAKES
HON. RICHARD J. CARDAMONE
HON. FRANK X. ALTIMARI,
Circuit Judges.

Docket No.: 94-7784

THE NORTH RIVER INSURANCE COMPANY,
Petitioner-Appellant,

v.

PHILADELPHIA REINSURANCE CORPORATION, ASSICURAZIONI GENERALI, EXCESS AND CASUALTY REINSURANCE ASSOCIATION, and UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S AND FOREIGN COMPANIES SUBSCRIBING TO SECOND EXCESS OF LOSS REINSURANCE CONTRACT NO. R64939,
Respondents-Appellees,

THE REINSURANCE CORPORATION OF NEW YORK,
Intervenor-Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of New York

MANDATE

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is reversed and the matter remanded to the said district court for further proceedings consistent with the opinion of this Court, with costs to be taxed against the appellees.

FOR THE COURT
GEORGE LANGE III
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

Issued as Mandate. 10/25/95

APPENDIX G

TITLE 9. ARBITRATION

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agree-

ment or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel

and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is

filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the some [sic] force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

Nos. 95-1128, 95-1138

Supreme Court U.S.
FILED
FEB 16 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

PHILADELPHIA REINSURANCE CORPORATION, *et al.*,

Petitioners,

-and-

UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S, *et al.*,

Petitioners,

vs.

THE NORTH RIVER INSURANCE COMPANY,

Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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33pp

QUESTIONS PRESENTED

1. Whether a district court may vacate an arbitration award rendered in a consolidated proceeding by reversing a prior order of the court consolidating the arbitration where there has been no intervening change in the controlling law, the party challenging the consolidation failed to exercise its right to take an immediate appeal from the consolidation order, and a balancing of the equities weighs in favor of allowing the award to stand.

2. Whether an order compelling arbitration on a consolidated basis *may* be appealed immediately when it arises in an independent proceeding brought solely to compel arbitration and seeking no relief on the merits of the dispute.

STATEMENT UNDER RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent The North River Insurance Company states that at all relevant times its ultimate parent, Xerox Corporation, issued shares to the public.

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13 James W. Moore, ed., *Moore's Federal Practice* ¶ 810.21 (2d ed. 1995) 10, 13

Respondent The North River Insurance Company ("North River") respectfully submits this brief in opposition to the petitions for a writ of certiorari which seek the review of a decision of the United States Court of Appeals for the Second Circuit. That decision is reported at 63 F.3d 160 (2d Cir. 1995) and is reprinted in both petitions at Appendix A.

STATEMENT OF THE CASE

This case concerns the Second Circuit's straightforward application of the well-established law of the case doctrine to the highly unusual facts before it. The Second Circuit reversed the District Court's vacatur of an arbitration award, which was based upon the District Court's erroneous decision to reverse an earlier order compelling the parties to proceed with an arbitration on a consolidated basis, holding that the District Court had no reasonable basis to depart from the law of the case doctrine to revisit its consolidation order and unravel a two-year arbitration proceeding. In reaching its decision, the Second Circuit emphasized the unique circumstances of this case, namely that: (1) the arbitration ordered by the District Court to proceed on a consolidated basis had already been concluded, following two years of exhaustive discovery and a four-day hearing; and (2) Petitioners chose not to appeal the District Court's consolidation order -- even though it was immediately appealable -- and instead challenged the order only after an arbitration award had

been entered against them.[1] The unusual nature of this case, by itself, demonstrates that the Second Circuit's decision is not an appropriate decision for review by this Court.

A. Arbitration Proceedings

In the arbitration proceedings, North River sought reimbursement from the Reinsurers for their share of millions of dollars in asbestos losses due and owing under a single reinsurance treaty program.[2]

During the period 1984 through 1986, North River paid $15 million for asbestos claims on behalf of its insured, the GAF Corporation ("GAF"), pursuant to a three-year umbrella liability policy that was in turn

---

[1] The domestic Petitioners (Philadelphia Reinsurance Corporation, Assicurazioni Generali, Excess and Casualty Reinsurance Association, and The Reinsurance Corporation of New York) will be referred to as the "U.S. Reinsurers." The foreign Petitioners (Certain Underwriters at Lloyd's, London and Foreign Companies Subscribing to Second Excess of Loss Reinsurance Contract No. R64939) will be referred to as the "London Reinsurers." They will be referred to collectively as the "Reinsurers."

[2] A reinsurance treaty -- one of the two basic forms of reinsurance contracts -- involves an ongoing contractual relationship between two or more insurers in which one agrees in advance to cede, and others to accept, specified business that is the subject of the contract. Under a treaty, the reinsurer agrees to indemnify the ceding insurer with respect to a "book" of the ceding insurer's underwriting activities for designated lines of business; such reinsurance arrangements typically involve the participation of many reinsurers, each accepting a percentage of the total liability under a single treaty.

reinsured under a treaty program. (A615-16).[1] North River billed its reinsurers for their participating shares of the losses under the treaty program. Seven of the twelve reinsurers paid their share of the GAF loss, consistent with their contractual obligations. The U.S. Reinsurers and the London Reinsurers, who were participants in the same treaty program, refused to pay their shares. (A617-18).

The treaty program subscribed to by the Reinsurers contained a single arbitration agreement applicable to all the participating reinsurers. (A615-16). In accordance with the arbitration agreement, North River commenced arbitration proceedings in December 1988 against the U.S. Reinsurers to collect reinsurance for the GAF losses. North River later commenced an arbitration in October 1989 against the London Reinsurers, pursuant to the same arbitration agreement. (A618).

In the two arbitrations, the parties selected the same two party-appointed arbitrators. (A618). For months, the two arbitrators attempted to select a third arbitrator to act as an umpire. On October 31, 1990, after the arbitrators reached an impasse over the selection of an umpire, North River commenced an independent proceeding in the District Court pursuant to sections 4 and 5 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 4-5 (1988 & Supp. 1993), seeking an order consolidating the arbitration against the U.S. Reinsurers with the arbitration against the London Reinsurers, appointing an umpire to complete the

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[1] Citations with the prefix "A" refer to the Joint Appendix filed with the Second Circuit.

panel and compelling the Reinsurers to proceed with the arbitration on a consolidated basis. (A619).

The District Court consolidated the arbitrations in May 1991 based upon the Second Circuit's decision in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975) ("*Nereus*"), *cert. denied*, 426 U.S. 936 (1976), and set forth a procedure for the selection of an umpire. In an order dated July 19, 1991 (the "July 1991 Order"), the District Court appointed an umpire and directed the parties to proceed with the arbitration on a consolidated basis. (A619). The Reinsurers chose not to appeal the July 1991 Order compelling arbitration on a consolidated basis -- even though it arose in an independent proceeding and was, therefore, a final appealable order -- opting instead to go forward with the arbitration.

In reliance upon the District Court's July 1991 Order and in accordance with a schedule approved by the arbitration panel, the parties expended substantial resources in conducting extensive joint discovery during the period October 1992 through April 1993. Discovery included production by the parties of approximately 11,500 pages of documents, production by non-parties of approximately 5,500 pages of documents, and 23 depositions of party and non-party witnesses taken in New York, Florida, Bermuda and London. (A619-20). After the close of discovery, the parties submitted to the panel extensive pre-hearing briefs, together with 254 pre-marked exhibits. (A620).

The parties presented their cases to the arbitrators during a four-day hearing from July 9 through July 12, 1993. North River called three witnesses and submitted

the deposition testimony of three witnesses. The U.S. Reinsurers called five witnesses and submitted the deposition testimony of five witnesses. The London Reinsurers called two witnesses and submitted the deposition testimony of one witness. (A621). At the conclusion of the hearing, the evidence of record consisted of the testimony of 19 witnesses and 338 exhibits.

Two weeks before the arbitration hearing, the Second Circuit issued its decision in *Government of the United Kingdom of Great Britain v. Boeing Company* ("*Boeing*"), 998 F.2d 68 (2d Cir. 1993).

After deliberating for more than one month following the conclusion of the hearing, the arbitration panel issued its award on August 21, 1993, finding in favor of North River on all counts and awarding North River the total sum of $2,636,000, plus interest. (A621, A491-96).

The District Court later concluded that the *Boeing* decision rendered the consolidated arbitration a nullity.

B. Post-Award Proceedings

The Reinsurers refused to pay the arbitration award, forcing North River to move in the District Court for confirmation of the award on October 28, 1993. (A486-89). The Reinsurers opposed North River's motion to confirm and cross-moved to vacate the award. By Memorandum Opinion and Order dated July 13, 1994, the District Court (Haight, J.) denied North River's motion to confirm and granted the Reinsurers' cross-motions to

vacate, remanding the proceedings for separate arbitrations *de novo*. (Pet. App., 24a).[4]

The District Court held that the Second Circuit's decision in *Boeing* had changed the controlling law as to the consolidation of arbitration proceedings and that, as a result, it must depart from the law of the case doctrine and reverse the earlier July 1991 Order. (Pet. App., 19a-23a). Thus, the District Court vacated the arbitration award and ordered the parties to proceed in two separate arbitrations, despite the fact that the Reinsurers had not challenged the District Court's July 1991 Order until *after* they lost the arbitration.

The Second Circuit reversed, holding that the District Court abused its discretion in vacating the earlier order compelling arbitration under the "intervening change in the law" exception to the law of the case doctrine. The Second Circuit found that the District Court lacked a reasonable basis to depart from the law of the case doctrine because: (1) there had in fact been no intervening change in the controlling law, based upon the *Boeing* decision, under the circumstances of this case (Pet. App., 10a); (2) "extensive discovery" had been conducted in the consolidated arbitration and "the arbitration proceedings have been completed," (Pet. App., 11a); and (3) the Reinsurers "chose not to challenge the consolidation on direct appeal," (Pet. App., 11a), even though the "district court's order compelling arbitration on a consolidated basis

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[4] Citations to "Pet. App." refer to the identical Appendices attached to the Reinsurers' petitions.

was a final order and was immediately appealable," (Pet. App., 7a).

In September 1995, the Reinsurers filed petitions for rehearing and rehearing in banc. The Second Circuit denied those petitions on October 18, 1995 and issued a mandate on October 25, 1995 reversing the District Court's decision and remanding this matter for further proceedings. (Pet. App., 31a-34a).

SUMMARY OF REASONS FOR DENYING WRIT

The Reinsurers have utterly failed to meet their burden of demonstrating that there is a "compelling reason" for this Court to review the Second Circuit's decision. They have not shown that the highly unusual situation presented in this case is likely to recur or that the Second Circuit's limited holding has broader implications. The Reinsurers also have not pointed to any true conflict between the Second Circuit's decision and precedent from this Court or other circuits, nor have they established that there is a federal question here which should be settled by this Court.

The Second Circuit expressly based its decision on the unique factual circumstances of this case. It held that the District Court abused its discretion in departing from the law of the case doctrine largely because the costly, time-consuming arbitration had already proceeded to conclusion and because the Reinsurers challenged the District Court's July 1991 Order only after an arbitration award was entered against them, even though they had the right to immediately appeal that decision two years earlier.

Given that the Second Circuit's decision was grounded in the unusual set of facts present here, which are unlikely to be repeated, it is not an appropriate decision for review by this Court.

The Reinsurers, in an effort to create a conflict for this Court to resolve, misconstrue the Second Circuit's decision. They mistakenly interpret the Second Circuit's decision as holding that a district court may, *at the very outset of a case*, order a consolidated arbitration absent the agreement of the parties. Such a holding, the Reinsurers assert, conflicts with cases from this Court and other courts of appeals. The Second Circuit, however, held only that in the unusual situation presented by this case -- where no timely appeal was taken from the order compelling arbitration on a consolidated basis, an arbitration had taken place and an award had been rendered -- proper application of the law of the case doctrine and consideration of the balance of equities weighed strongly in favor of allowing the arbitration award to stand. The Second Circuit never reached the broader issue posed by the Reinsurers in their petitions, *i.e.*, whether a district court, in general, may invoke its equitable powers to order consolidation in the first instance, *before* an arbitration has occurred. Thus, there is no conflict with precedent and no need for review by this Court.

The U.S. Reinsurers also claim that the Second Circuit ignored precedent regarding the law of the case doctrine. The Second Circuit, however, correctly followed decisions from this Court holding that a district court may revisit an earlier order only to correct a "clearly erroneous" ruling *and* to prevent "manifest injustice." The Second Circuit stated that there was no clear error in this case

because the controlling law in the Second Circuit had not changed after the order compelling arbitration was entered. The Second Circuit similarly found that no "manifest injustice" would result if the arbitration award were allowed to stand. To the contrary, it concluded that the balancing of the equities involved, including the fact that the Reinsurers chose not to appeal the District Court's July 1991 Order directly, strongly favored confirmation of the award. Thus, the Second Circuit's decision was merely an application of recognized and settled law of the case precedent. Because this Court generally will not review the application of a properly stated rule of law, the Second Circuit's holding on the law of the case doctrine cannot serve as a basis for granting certiorari.

Equally unavailing is the U.S. Reinsurers' contention that the Second Circuit's decision undermines the ability of a district court, pursuant to section 10(a)(4) of the FAA, 9 U.S.C. § 10(a)(4) (1988 & Supp. 1993), to vacate an award when the arbitrators exceed their powers. The Second Circuit did not even address the power of a district court in such situations. Instead, it held that where, as in this case, the equities weigh against the reconsideration of a prior order, section 10(a)(4) cannot be used as an alternative basis for departing from the law of the case doctrine. Therefore, the Second Circuit did not limit a district court's power under the FAA, and there is no conflict between the Second Circuit's decision and precedent construing section 10(a)(4).

The U.S. Reinsurers' final argument is that the Court should grant certiorari in order to clear up the "confusion" among the circuits concerning the appealability of an order compelling arbitration. Simply put, no such

confusion exists. The vast majority of the courts of appeals (including the Second Circuit) have adopted a bright-line test for appealability based on whether the order arises in an "independent" or "embedded" proceeding. The independent-embedded test is both widely and consistently applied, as is illustrated even by the cases cited in the U.S. Reinsurers' petition.

In sum, the Reinsurers have not shown that the Second Circuit's decision involves recurring issues of importance, conflicts with precedent from this Court or from other courts of appeals, or implicates the Court's power to settle important federal questions. Accordingly, the Reinsurers' petitions for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

Standard for Granting Writ of Certiorari

The rules of this Court state that a petition for a writ of certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10. In general, certiorari will be denied if the case involves circumstances or issues which are not likely to be repeated, *see Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (noting that the Court reviews issues that are "beyond the academic or the episodic"); 13 James W. Moore, ed., *Moore's Federal Practice* ¶ 810.21 at SC10-23 (2d ed. 1995) (stating that the Court will not be inclined to review "an issue that is unlikely to recur" or "results from a unique factual situation"), or if "the asserted error consists of . . . the misapplication of a properly stated rule of law,"

Sup. Ct. R. 10. Moreover, certiorari will be granted "only 'in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority'" between the courts of appeals. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)). Finally, the Court has refrained from resolving conflicts that arise between panels within the same circuit, on the grounds that such conflicts should be resolved by the court of appeals internally. *See, e.g., Taylor v. U.S.*, 493 U.S. 906, 906 (1989); *Davis v. U.S.*, 417 U.S. 333, 340 (1974); *Wisniewski v. U.S.*, 353 U.S. 901, 902 (1957).

POINT I

NO CONFLICT EXISTS BETWEEN THE SECOND CIRCUIT'S DECISION AND PRECEDENT FROM THIS COURT AND OTHER COURTS OF APPEALS

A. The Second Circuit Held Only That in the Special Circumstances Before It the District Court Had No Reasonable Basis to Depart from the Law of the Case Doctrine

According to the Reinsurers, the Second Circuit held that a district court may use its equitable powers to order a consolidated arbitration absent the agreement of the parties. Petition of U.S. Reinsurers ("USR Pet.") at 15-16; Petition of London Reinsurers ("LR Pet.") at 9. The Reinsurers contend that this supposed "holding" conflicts with *Volt Info. Sciences v. Board of Trustees*, 489 U.S.

468, 478 (1989), *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("*Byrd*"), and cases from other courts of appeals which state that a district court may enforce arbitration agreements solely in accordance with their terms. USR Pet. at 7-8, 10-11; LR Pet. at 6, 9-10.

The Reinsurers' argument, however, is based upon a fundamental misreading of the Second Circuit's limited holding. The Second Circuit did not address the issue of whether a district court may order a consolidated arbitration *in the first instance* on a motion to compel, absent the parties' agreement. Rather, the Second Circuit considered "whether equitable principles allow for the confirmation of an award in a consolidated proceeding *already had*." (Pet. App., 10a (emphasis added)). The Second Circuit noted that its opinion in *Government of the United Kingdom of Great Britain v. Boeing Company* ("*Boeing*"), 998 F.2d 68 (2d Cir. 1993), was consistent with this Court's precedent, but had left undisturbed the "general equitable powers of the court." (Pet. App., 10a). The Second Circuit then applied *Boeing* to the highly unusual circumstances present here, concluding that:

> [T]he equities *in this case* require that the award from the consolidated arbitration stand. Extensive discovery has already been had in the consolidated case, and the arbitration proceedings have been completed. The [Reinsurers] chose not to challenge the consolidation on direct appeal.

(Pet. App., 11a (emphasis added)).

There are, therefore, two reasons why this Court should not review the Second Circuit's decision. *First*, the decision turned on a set of facts which are unique and not likely to be repeated. In fact, our research reveals that of the cases cited by the *Boeing* court as illustrations of consolidation under *Nereus*, *see* 998 F.2d at 71 n.1, it was only in this case that the District Court revisited and reversed the consolidation order. This Court has stressed that it will not review a case if it presents an "episodic" problem or involves an issue "unlikely to recur." *Rice*, 349 U.S. at 74; 13 *Moore's Federal Practice* ¶ 810.21 at SC10-23. This is clearly such a case.

Second, the conflict alleged by the Reinsurers does not in fact exist. The Second Circuit's decision cannot be in conflict with *Volk*, *Byrd* and the other cases cited by the Reinsurers because those cases dealt with an issue never presented in this case, *i.e.*, whether a district court may order a consolidated arbitration, absent the parties' agreement, before an arbitration has taken place. That would have been the issue presented to the Second Circuit had the Reinsurers taken a direct appeal of the July 1991 Order, as was their right, before the arbitration proceeded to conclusion. That is not what occurred, and the Second Circuit expressly limited its decision to the situation at hand, namely a collateral attack on the consolidation order after the arbitration had already been conducted.[2]

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[2] Rather than pointing to any real conflict, the Reinsurers are essentially disagreeing with the Second Circuit's application of the clear language in *Boeing* to the unique facts of this case. This Court, however, will "rarely" grant certiorari where, as here, the asserted error consists of the misapplication of a properly stated rule of law. Sup.

(continued...)

Because the Second Circuit limited its holding to the unique facts before it and because the decision in no way conflicts with precedents from this Court or other circuits, the petitions for a writ of certiorari should be denied.

B. The Second Circuit Properly Applied Well-Established Law of the Case Doctrine in Holding that the District Court Abused Its Discretion

The U.S. Reinsurers also attempt to create a conflict by suggesting that the Second Circuit ignored law of the case precedent. USR Pet. at 19-21. Yet the Second Circuit's decision was nothing more than a proper application of long-standing, established law of the case precedent to the highly unusual facts and circumstances of this action. As such, it is not an appropriate decision for review.

This Court has stated that as a rule courts should be "loathe" to depart from the law of the case doctrine and revisit prior orders "in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'"

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[2](...continued)
Ct. R. 10. Moreover, to the extent that the Reinsurers have asserted that the Second Circuit's decision conflicts with other Second Circuit precedent, *see. e.g.*, USR Pet. at 7-8, LR Pet. at 2-3, this Court has held that such conflicts are best resolved by a court of appeals sitting in banc. *See Taylor*, 493 U.S. at 906; *Davis*, 417 U.S. at 340; *Wisniewski*, 353 U.S. at 902. Here, the Second Circuit denied the Reinsurers' efforts to have this matter reheard in banc. (Pet. App., 31a-32a).

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). The Second Circuit cited *Christianson* and applied it to this case, finding that the District Court abused its discretion because the required "extraordinary circumstances" were not present. (Pet. App., 9a-11a).

Turning first to the "clearly erroneous" prong of the two-part test set forth in *Christianson*, the Second Circuit pointed out that there had been no intervening change in the law rendering the District Court's July 1991 Order erroneous. The Second Circuit noted that *Boeing* did not "truly" change the law in the circuit because it was based on this Court's holdings in *Volt*, *Byrd* and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). (Pet. App., 10a). It further stated that *Boeing* had preserved the "general equitable powers" of the district courts. (Pet. App., 10a). Thus, the Second Circuit determined that *Boeing* did not require reversal of an order of consolidation *after* an award had already been rendered -- particularly where the party opposing consolidation could have immediately appealed the consolidation order but chose not to appeal -- because the equities weighed strongly in favor of permitting the award to stand.

The Second Circuit also concluded that the second, "manifest injustice" prong of the *Christianson* test had not been satisfied. Instead of finding that the District Court's order would work a "manifest injustice" if it were allowed to stand, the Second Circuit found that it would be manifestly unjust to vacate the arbitration award. According to the Second Circuit, the balancing of the equities -- which includes the Reinsurers' failure to take a direct appeal from the July 1991 Order as well as the fact

that the arbitration proceedings had already taken place at great expense and effort to the parties -- weighed strongly in favor of allowing the arbitration award to stand. (Pet. App., 10a-11a).[6]

The U.S. Reinsurers' insist that the Second Circuit "failed even to consider or address" the relevant law of the case precedents. USR Pet. at 21. It is beyond dispute, however, that the Second Circuit reached its conclusion by applying *Christianson* and other well-recognized precedent from this Court. Once again, the core of the U.S. Reinsurers' complaint is that the Second Circuit misapplied the law of the case doctrine here, not that the Second

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[6] The U.S. Reinsurers assert that the district court's original consolidation order caused them "prejudice." USR Pet. at 11. The U.S. Reinsurers, however, offer no support for their vague assertion of prejudice and the record clearly indicates that consolidation had no adverse effect on them. The U.S. Reinsurers selected one of the panel members (as was their right under the arbitration agreement), took extensive discovery, submitted a pre-hearing brief with exhibits, and participated fully in the arbitration hearing itself. (A618-21). In other words, the U.S. Reinsurers proceeded in the consolidated arbitration as they would have in a separate, unconsolidated arbitration. Moreover, the U.S. Reinsurers cannot complain that consolidation with the London Reinsurers' arbitration increased the cost of the arbitration because they voluntarily participated in the discovery taken from the London Reinsurers and even demanded discovery from reinsurers who were not parties to the arbitration. (A619-20).

In their arguments to the Second Circuit, the U.S. Reinsurers asserted that they were prejudiced by the consolidated arbitration because the proceedings took longer and were more expensive due to there being more parties. Yet the relief the Reinsurers seek, separate arbitrations *de novo*, would only compound the time and cost of the proceedings.

Circuit misstated the doctrine itself.[2/] As noted above, *see supra* at 10-11, 13-14, this Court will usually refuse to grant certiorari where, as here, the petitioner has asserted that the court of appeals erred in applying a properly stated rule of law. Sup. Ct. R. 10.

C. The Second Circuit's Analysis of Section 10(a)(4) of the Federal Arbitration Act Does Not Affect a District Court's Powers or Conflict with any Applicable Precedent

The U.S. Reinsurers' final attempt at finding a conflict between the Second Circuit's decision and precedent centers on the Second Circuit's two-line reference to section 10(a)(4) of the FAA, which provides that a court may vacate an arbitration award "[w]here the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). In response to the Reinsurers' argument that the District Court properly vacated the award pursuant to section 10(a)(4), the Second Circuit stated that "section 10 does not provide an independent means of challenging the district court's order compelling a consolidated arbitration which was appealable, but which was not appealed." (Pet. App., 12a n.3). This statement, the U.S. Reinsurers contend, effectively "nullifies" the power of a district court to vacate arbitration awards whenever the arbitrators have exceeded their powers, USR Pet. at 17, and conflicts with precedent regarding section 10(a)(4), USR Pet. at 18.

[2/] The U.S. Reinsurers admit as much when they refer to the Second Circuit's "misapplication of the law of the case doctrine." USR Pet. at 18.

The U.S. Reinsurers, however, again misinterpret the Second Circuit's decision. The Second Circuit expressed no opinion as to the general power of a district court to vacate an award under section 10(a)(4) where the arbitrators have exceeded their powers. Rather, it merely said that under the unique circumstances of this case section 10(a)(4) could not be used as an independent basis for departing from the law of the case doctrine and reversing the earlier order of consolidation. The Second Circuit's decision, therefore, in no way limits a district court's ability to vacate an award if it finds that the arbitrators exceeded their powers. Since the question now raised by the U.S. Reinsurers in their petition was not presented by the unusual circumstances of this case and, accordingly, was never even reached by the Second Circuit, there can be no conflict between the Second Circuit's decision and the cases construing section 10(a)(4).

POINT II

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW PRESENTED HERE THAT SHOULD BE SETTLED BY THIS COURT

In an attempt to provide an alternative grounds for granting certiorari, the U.S. Reinsurers argue that this Court should review the Second Circuit's decision so that it may settle the wholly tangential issue of when an order compelling arbitration is appealable. They claim that the prevailing test, which examines whether the order arises in an "independent" or an "embedded" proceeding, has

created recurring confusion and led to inconsistent results.[9/]

The case law, however, does not support the U.S. Reinsurers' contentions. The overwhelming majority of circuits have adopted the independent-embedded standard. *See, e.g., Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1302 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S. Ct. 61 (1995); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95-96 (8th Cir. 1994); *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 667-68 (5th Cir.), *reh'g and reh'g in banc denied*, 21 F.3d 1110, *cert. denied*, ___ U.S. ___, 115 S. Ct. 195 (1994); *Humphrey v. Prudential Sec., Inc.*, 4 F.3d 313, 317-18 (4th Cir. 1993); *McDermott Int'l v. Underwriters at Lloyds*, 981 F.2d 744, 747-48 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2442 (1993); *Filanto*, 984 F.2d at 60-61; *Perera v. Siegel Trading Co.*, 951 F.2d 780, 783-86 (7th Cir. 1992); *Seguro de Servicio de Salud de Puerto Rico v. McAuto Sys. Group, Inc.*, 878 F.2d 5, 7 n.3 (1st Cir. 1989); *Thomson McKinnon Sec., Inc. v. Salter*, 873 F.2d 1397, 1399 (11th Cir. 1989) (per curiam); *Zosky v.*

[9/] The Second Circuit recently described the independent-embedded test for appealability in *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58 (2d Cir. 1993). It noted that an order compelling arbitration is immediately appealable if an action is "'independent,' *i.e.*, the plaintiff seeks an order compelling or prohibiting arbitration or a declaration that a dispute is arbitrable or is not arbitrable," and no party seeks any other relief regarding the *merits* of the dispute. Such an order, however, is not immediately appealable if an action is "embedded," *i.e.*, a party seeks some relief on the merits of the dispute in addition to an order requiring or prohibiting arbitration. *Id.* at 60.

Boyer, 856 F.2d 554, 558-59 (3d Cir. 1988), *reh'g and reh'g in banc denied*, 856 F.2d 554 (3d Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989).[2]

The independent-embedded distinction has been adopted precisely because it is a bright-line test yielding consistent results. *See Gammaro*, 15 F.3d at 96 (describing the standard as a "bright-line rule" that avoids "a more attenuated, case-by-case determination of jurisdiction"); *Zosky*, 856 F.2d at 560 (noting that the independent-embedded standard "serves the purposes of preventing piecemeal appeals"); Edith H. Jones, *Appeals Out of Arbitration Orders -- Coming Out of the Serbonian Bog*, 31 S. Tex. L. Rev. 361, 376, 379 (1990) (describing independent-embedded test and current rules governing appealability as "comprehensive, easy to understand, and readily available to the average practitioner"). Indeed, the independent-embedded standard is such a useful test that it was codified in the 1988 amendments to the FAA. *See Gammaro*, 15 F.3d at 96 (noting that Congress intended to codify the independent-embedded distinction in the 1988 amendments); *Filanto*, 984 F.2d at 60 ("Congress built upon the distinction the courts had previously recognized between so-called 'independent' proceedings and so-called 'embedded' proceedings . . . ."); *Perera*, 951 F.2d at 783 ("[A]s for decisions favoring arbitrations, the statute codifies the judicial distinction that existed prior to the enactment of the 1988 amendments . . . .").

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[2] It should be noted that in four of the foregoing cases applying the independent-embedded test, *Prudential Insurance*, *Sphere Drake Insurance*, *McDermott* and *Zosky*, this Court declined to grant certiorari.

The cases cited by the U.S. Reinsurers do not demonstrate, as the U.S. Reinsurers claim, that the independent-embedded distinction is "opaque" and leads to inconsistent results. USR Pet. at 12. Those cases instead illustrate that the independent-embedded test is easy to apply and promotes a consistency of results, even in varied situations. *See American Casualty Co. v. L-J, Inc.*, 35 F.3d 133, 137 (4th Cir. 1994) (dismissing appeal from order arising in embedded proceeding where party sought "separate declaratory relief" regarding the merits in addition to a determination of arbitrability); *Adair Bus Sales*, 25 F.3d at 955 (dismissing appeal from order arising in embedded proceeding where "relief other than arbitrability [was] sought"); *Gammaro*, 15 F.3d at 95 (noting that the application of the independent-embedded distinction "is rather straightforward" and dismissing appeal from order arising in embedded proceeding where one party sought relief other than a determination of arbitrability); *Corion Corp. v. Chen*, 964 F.2d 55, 58 (1st Cir. 1992) (dismissing appeal from order arising in embedded proceeding where party "did not ask the court to decide only arbitrability"); *Campbell v. Dominick & Dominick, Inc.*, 872 F.2d 358, 359 (11th Cir. 1989) (dismissing appeal from order arising in embedded proceeding where one party sought relief other than a determination of arbitrability).[10/] Thus, there has been no

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[10/] The only case cited by the U.S. Reinsurers with a seemingly inconsistent result is *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1273-76 (6th Cir. 1990), where the court held that an order to compel could be appealed even though it arose in an embedded proceeding. The U.S. Reinsurers' reliance on *Arnold*, however, is seriously misplaced because in that case the Sixth Circuit refused to adopt the

(continued...)

confusion or inconsistency in the application of the independent-embedded distinction.

Moreover, even if the independent-embedded standard were producing confusion or inconsistent results, there are two additional reasons why this Court should not grant certiorari. First, in this case it was clear that the District Court's July 1991 Order arose in an independent proceeding and was immediately appealable. As the Second Circuit noted:

> The case before us fits squarely within the definition of an "independent" proceeding. North River initiated this action under Sections 4 and 5 of the FAA, asking the district court to compel arbitration in its disputes with the U.S. and London reinsurers. No other relief was sought.[11/]

[10/](...continued)
independent-embedded standard. *See* 920 F.2d at 1276. *Arnold*, therefore, is simply not relevant to the U.S. Reinsurers' claim.

[11/] In seeking an order compelling arbitration, North River also asked the District Court to consolidate the arbitrations and appoint an umpire. As the Second Circuit recognized, such procedural relief is ancillary to an order compelling arbitration and did not make the proceeding in the District Court an "embedded" proceeding. Under *Filanto* and the other cases describing the independent-embedded standard, a proceeding is embedded only when a party seeks substantive relief on the merits of the dispute. *See supra* at 19-20. Here, neither party sought any relief on the merits.

(Pet. App., 6a-7a). This case, in other words, is not an appropriate vehicle for evaluating the independent-embedded test.

Second, because Congress intentionally preserved the independent-embedded standard when it amended the FAA in 1988, it is for Congress to change the law. *See Stedor Enters. Ltd. v. Armtex, Inc.*, 947 F.2d 727, 732 (4th Cir. 1991) (stating that only Congress, not the courts, may change the law regarding the appealability of orders compelling arbitration); 4 Ian R. MacNeil, *et al.*, *Federal Arbitration Law* § 43.2.5 at 43:40 (1995) (noting that "[g]iven the legislative history of FAA § 16," there is no "truly adequate cure" for any perceived problems except through congressional action). This Court, therefore, should not review the Second Circuit's decision based on the U.S. Reinsurers' claim that the prevailing test for the appealability of orders compelling arbitration is somehow deficient.

CONCLUSION

For the foregoing reasons, the petitions of the U.S. and London Reinsurers for a writ of certiorari should be denied.

Dated: February 16, 1996
New York, New York

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